Supreme Court of the United States

October Term, 1977

No. 77-430

VIRGIL OGLETREE and DONALD MOORE,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

JAMES R. WILLIS
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Counsel for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes and Rules

Supreme Court of the United States

October Term, 1977

No. .....

VIRGIL OGLETREE and DONALD MOORE,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Fifth Circuit

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Virgil Ogletree and Donald Moore, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which judgment became final on *August 19, 1977*—the date when the rehearing was denied.

OPINIONS BELOW

The original Opinion, reported under the name *United States v. Scott, et al.*, 555 F.2d 522 (July 11, 1977), is designated Appendix "A" and attached here, *infra*, page A1.

JURISDICTION

The Opinion of the Court of Appeals affirming the convictions, as indicated above, became final on August 19, 1977. The jurisdiction of this Court is being invoked under Title 28 United States Code, §1254(1), which provides for review by Writ of Certiorari of any case decided by the Court of Appeals.

QUESTIONS PRESENTED

1. Whether the Trial Court erred in denying the petitioner Donald Moore's Motion for the Return of Illegally Seized Evidence and for the Suppression of Evidence.

2. Whether admission of certain testimony by various unindicted co-conspirators violated petitioner Ogletree's right of confrontation and the hearsay rule.

3. Whether the Trial Court erred (or otherwise abused its discretion) in failing to require the Government to furnish certain evidence essential to the preparation of their overall defense.

4. Whether proof of a single overall conspiracy is shown by proof of membership in one of several possible conspiracies.

5. Whether the facts here are constitutionally sufficient to support Ogletree's conviction.

6. Whether the impermissible grant to the Government of an extra-peremptory jury challenge deprived the petitioners of a fair trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment IV.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment VI.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Code:

18 U.S.C. §371.

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1955(a) and (b).

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and,

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to poolselling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Federal Rules of Criminal Procedure:

Rule 24. Trial Jurors

* * * * *

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

STATEMENT OF THE CASE

This is an appeal by Virgil Ogletree and Donald Moore (hereinafter referred to as Ogletree and Moore) from judgments of conviction and sentences imposed against them in the United States District Court for the Northern District of Georgia, for violations of 18 U.S.C. §§371 and 1955. The indictment (App., p. 3)[1] in this case named twelve defendants. Nine others were denominated as "co-conspirators," but were not named as defendants.

---

1. References to (App., p. ....) are to be the printed Appendix, filed in the Court of Appeals on behalf of Ogletree and Moore, as Appellants. When references are made to the Transcript of Proceedings, the designation will be to the Volume and page (Vol. ...., p. ....).

Verdicts of guilty for the above indicated charges were returned against nine of the eleven trial defendants. One defendant was acquitted on the §371 charge and the other defendant was found not guilty on both charges. Both Ogletree and Moore were acquitted on separate charges that they had, in violation of 18 U.S.C. §§1952 and 2, caused the interstate travel of two of the unindicted co-conspirators. Count III charged Moore in connection with the travel of Ruby Hammons, Ogletree with that of Mary Stewart. All those adjudged guilty were sentenced. Ogletree was sentenced to serve concurrent terms of 5 years plus a $20,000 fine. Moore's sentence was 4 years concurrent terms and a $15,000 fine. Subsequent to the imposition of these sentences both Ogletree and Moore perfected unsuccessful appeals to the Court of Appeals.

STATEMENT OF FACTS

(1)

The indictment in this case specifically charged, in Count I, Ogletree, Moore (the petitioners herein) and the others with conspiracy "to commit certain offenses against the United States . . . [by conducting, in various capacities] an illegal gambling business . . . in violation of . . . [the] Criminal Code of Georgia." Count II charged a substantive violation of 18 U.S.C. §1955. Here the contention was that these petitioners, their co-defendants and the unindicted co-conspirators, did in fact "conduct, finance, manage, supervise, direct and own, and cause to be conducted, financed, managed, supervised, directed and owned, all or part of an illegal gambling business, that is, an illegal numbers lottery business involving five or more persons, which has been and remains in substantially continuous operation for a period in excess of 30 days and which has a gross revenue of $2,000.00 in any single day,

in violation of Sections 2703 and 2706, Title 26 of Criminal Code of the State of Georgia, in which State it is conducted, and in violation of Sections 1955 and 2, Title 18, United States Code."

Ogletree and Moore filed a variety of pretrial motions. These included Motions for a Bill of Particulars (App., p. 25), and a *Brady*-type Motion for the Disclosure of Evidence Beneficial to the Defendants (*id.*, p. 29). Also motions were filed in quest of the identity of various so-called informants, and for copies of the grand jury testimony and interview notes of the unindicted co-conspirators (*id.*, p. 28).

In addition to these motions, Moore sought the suppression of evidence seized from his home. Distilled, as will be more fully developed, it was here contended that, among other things, the affidavit was constitutionally insufficient to support the issuance of the search warrant (*id.*, p. 31).

Apart from the Motion to Suppress, in the other pretrial motions, these petitioners specifically sought, *inter alia*, an order requiring the Government:

> (1) to furnish them with "The names and addresses of those persons the Government has credited with being informers and sources in its affidavit for the search warrants in this case" (App., p. 28).
>
> (2) to indicate whether any defendant named in the overt acts under Count I . . . was acting on behalf of the United States Government at the time of the alleged acts (*id.*, pp. 25-26).
>
> (3) to indicate whether any unindicted co-conspirators named in the indictment were acting on behalf of the United States Government at any time

during the period covered by any Count in the indictment (*id.*, p. 26).

(4) to set forth the names and addresses of any persons who actively participated in the matters of which defendants stand accused and who furnished information to law enforcement officers (*ibid.*).

(5) to disclose ". . . the names and addresses of any persons who actively participated in the matters for which these defendants stand accused and who furnished information to the Government." (*ibid.*).

In dealing with the request for the identity of the informers the stated position of the Government was that they were only "required to reveal their identity [of participating informers] at the trial . . . if . . . [Ogletree and Moore could] demonstrate the need to know the names of these 'sources' in order that they may receive a fair trial, or that such disclosure would be helpful to their defense." The Government further contended that no such need had been demonstrated (App. p. 43).

As to the claimed informers and sources, the contention was repeatedly made that not only was "some of the information attributed to them . . . false, but also that the danger exists that information and credibility factors . . . [were] willfully attributed to nonexistent informers and sources solely for the purpose of improperly prevailing upon, or otherwise imposing upon, the magistrate to issue the search warrants in this case." (*id.*, p. 38).

(2)

The Government's proof was based, in addition to a considerable quantity of gambling records and documents, on the testimony of five of the nine unindicted co-conspirators (all of whom had been informally immunized), more

than thirty FBI agents, several local police officers, some expert witnesses, telephone officials and some hotel employees.

The agents testified to various surveillances conducted on these petitioners and some of their co-defendants. In addition, most of them testified regarding the seizure of numbers paraphernalia and records from the persons and residences of the petitioner Moore and some of the other alleged co-conspirators. The bulk of the seized property came from premises rented by either the defendant James Harding or Mary Stewart.

Telephone company employees produced records showing the call activity between phones listed to, or available for use by, Frank Moten in New York and New Jersey, Virgil Ogletree in Ohio, and James Harding, Donald Moore and Eugene Scott in Atlanta. Simply put, these records simply reflect the fact that calls were made between the various numbers. Save in very few instances, there was no evidence as to whether any of the alleged conspirators participated in any of these calls (Vol. 13, p. 129 *et seq.*). And most assuredly there was no evidence as to the contents of any of these calls.

While the existence of any substantive proof of participation by Ogletree has continued to defy all efforts by the Government to meaningfully articulate, it cannot be denied the thrust of the Government's proof here was to show, if it did, that Moore, the Lyles, Ruby Hammons, Gene Scott, Jean Brown, Jerry Pierce and John Allen were originally involved in a lottery operation. Ogletree, it was contended, was the "Banker" and owned the business with Moore, who was involved as a supervisor (Vol. 17, p. 5).

In support of the Government's thesis, evidence was offered through Betty Lyles and Ruby Hammons that they worked as office girls in the operation up until December, 1973 (Vol. 6, p. 173) and January, 1974 respectively. According to Betty Lyles, she never saw Gene Scott do anything involving the numbers (Vol. 7, p. 34), and Jean Brown was only involved as a substitute when Ruby Hammons was out sick (*id.*, p. 25). John Allen and Donald Moore were viewed by them as the Bosses (*id.*, p. 36). Julius Lyles was recognized as having a function (*id.*, p. 39). Jerry Pierce, it was established through Ruby Hammons, originally turned in number plays, which they recorded (Vol. 6, p. 146). Later, after she was fired by John Allen, Hammons says Pierce and Julius Lyles "tried to book for a while" (Vol. 6, p. 168).

Julius Lyles testified to substantially the same facts, but added that by January, 1974 he teamed up with Jerry Pierce (Vol. 7, p. 83), who had by then gone into business for himself with Ruby Hammons (*id.*, p. 83). As Lyles put it, he terminated his connection with the Moore lottery (*id.*, p. 82). Jerry Pierce's evidence was that he would collect bets from people who played with him at 400-1 odds and he *would pass their bets on as his bets* at odds of 500-1 (*id.*, pp. 145-146).

(3)

While a dispute surely exists as to whether Gene Scott and Jean Brown were participants (within the meaning of §§1955 and 371), at least this much seems beyond dispute, by early January, 1974 Pierce, Hammons and the Lyles were no longer involved in the lottery with Donald Moore and John Allen. In addition, none of them testified to *any* contact with Ogletree. The sole exception is Julius Lyles, who saw him at several social affairs at

which there was absolutely no conversation about any gambling (*id.*, p. 66).

It is true, as will be developed more fully, that Lyles did testify that there was an occasion when he attempted to borrow some money from Moore to open a restaurant (Vol. 7, p. 60). Moore indicated he (Moore) would have to ask Virgil Ogletree about it (*id.*, p. 60). No reason was indicated as having been given why Moore had to ask Ogletree (*ibid.*). Also, there was testimony by Pierce that there was an isolated conversation he had with Moore, in which Moore said he would have to talk with his "partner", Ogletree (*id.*, p. 112), before Pierce could be given a bigger percentage.

Next the evidence shows that James Harding became involved in the numbers in Atlanta in May or June 1974. Both Harding (Vol. 18, pp. 198, 111) and Allen (Vol. 17, p. 112) agree that at this point not only was Moore out, but the operation was a new and different one. All payments were made to Harding. They had different odds—that is 400-1, instead of the 500-1. Moore paid (Vol. 17, p. 84). Harding had cut numbers, whereas Moore had none (*ibid.*). Allen knew where the office was when he worked for Moore (*id.*, at 85), but had no such knowledge when James Harding booked the numbers (*id.*, at 86, 91).

Harding's testimony on these same points was that his was a new and different business (Vol. 18, p. 107), and that the only connection he had with any of Moore's people was the fact that he hired John Allen to work for him (*id.*, p. 108). He testified even with Gene Scott (*id.*, p. 112) and his office girl, Mary Stewart, he was not conducting a 5-man operation[2] (*id.*, pp. 112-114).

---

2. See *United States v. Pepe*, 512 F.2d 1129 (3d Cir. 1975). *Cf.*, *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973).

So postured, crucial issues certainly exist as to whether the Harding operation and the Moore operation were one and the same. This much seems obvious, with the Lyles, Pierce, and Hammons gone before, as the evidence shows, Harding ever came to Atlanta, any connection between the "Ducky Moore" lottery and that admittedly operated by Harding is not only tenuous, but seemingly is too frail to satisfy even minimal suffficiency requirements.

ARGUMENT

I. THE COURT ERRED IN DENYING THE PETITIONER MOORE'S MOTION FOR THE RETURN OF ILLEGALLY SEIZED PROPERTY AND FOR THE SUPPRESSION OF EVIDENCE.

A. Probable Cause to Support the Issuance of a Search Warrant Is Not Supplied by an Affidavit Which Not Only Fails to Satisfy Fundamental Criteria, but Further Consists of Conclusory Assertions, Ineptly, Fallaciously and Artificially Created by the Asserted Informers or for Them.

(1)

It is, of course, axiomatic that when the sources of information relied on for the issuance of a warrant are unnamed, the Court issuing the warrant must be furnished with sufficient background information to support a judgment as to the sources' credibility and/or the reliability of their information. Quite obviously, the credibility of a source as a person and the reliability of his information are alternative aspects of a trustworthiness analysis.

The common denominator in the controlling decisions evaluating the credibility of the different types of sources is that the issuing court is required to have before him enough circumstances for him to judge for himself whether a constitutionally sufficient basis exists for the issuance of the warrant. *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969).

In line with these cardinal principles seems to be the tenet that a Court may no more accept an affiant's assertions that his sources are credible in lieu of a recitation of facts sufficient for the Court to make this judgment for himself, than the Court may accept an affiant's assertion that the affiant himself is credible as a substitute for the affiant taking the oath (*Spinelli v. United States,* 393 U.S., at 424).

By force of the same logic, a court may not credit the unsworn hearsay conclusion (that a crime has been committed or that contraband is at a certain location) from even a credible informant any more than he may credit the sworn conclusion of a credible affiant. *United States v. Ventresca,* 380 U.S. 102, 108-109 (1965).

If the *Aguilar-Spinelli* test is still a viable precedent, the question then is did the affidavit furnish, or otherwise set forth, a sufficient basis for Judge Edenfield (who issued the warrant) to have concluded (1) that the informants and sources were credible *or* their information otherwise reliable, *and* (2) that the informers' conclusions were validly arrived at (*Aguilar v. Texas,* 378 U.S., at 144; *Spinelli v. United States,* 393 U.S., at 413).

In this case, on the credibility question, the contention has been, and is being, made that the very existence of some of these so-called informants and sources *is* in question. Further, we again contend that arguably informa-

tion has been artifically imputed to them. Cogent support for this thesis is provided by the known fact law enforcement officers all too frequently exaggerate prior reliability of informers, or create out of whole cloth informers for the sole purpose of attributing to them factors contributory to a showing of probable cause.

At least this much is certain, the danger is far too great that many of the officers engaged in the "often competitive enterprise of ferreting out crimes" (*Johnson v. United States*, 333 U.S. 10, at 14 [1948]), are so frustrated by the requirements of probable cause that they conjure up details to fit a proven formula of sufficiency and reliability. *United States v. Belculfine*, 508 F.2d 58 (1st Cir. 1974).

(2)

In looking then at the basis of knowledge "prong" of the *Aguilar-Spinelli* test, it could not be clearer, the undisclosed informants and sources (relied on by our affiant) were at best passing on hearsay, or idle rumor that, for aught that appears, was picked up by them from secondary or even more remote sources. None of them were credited with having given any firsthand information about Donald Moore (or for that matter about any of the persons whose property was searched and seized). The only possible exception comes from those informers who are credited with having said they were at a party in 1973, or that say they were solicited to join the so-called "Moore Lottery." On the other hand, none admitted having done so.

Dealing then directly with the various informers and sources, *first*, in an effort to isolate them and the information assertedly contributed by them, and *then* as a basis for measuring all this for conformity with the standards for issuing search warrants. Here the affidavit of Agent

Burgess shows Informants One, Two, Three and Four personally[3] admitted participation in gambling activities (App. p. 96). More specifically, affiant stated that between July 6, 1973, and September 28, 1973, Informant No. One related to the FBI the following conclusory assertions:

> (a) Two men reportedly from Cleveland were in association with Bobby McGhee and were using Shipwreck to work the lottery for them in Atlanta (*id.*, p. 97),
>
> (b) These two men held a party to which they invited various operators into the new lottery. The new lottery was paying more on winning numbers (*ibid.*),
>
> (c) The latter part of September, 1973, this informant *learned* the new lottery was paying 600-1 and that Robert Hodges was still working. On April 24, he advised that the Moore Lottery was still working and that at least six big local bookies were turning in this business (*id.*, pp. 97-98),
>
> (d) On August 9, he "advised that as of that date he had been informed" that the lottery was doing $10,000 daily and *he learned* this lottery settled up on Tuesday and used the phone exclusively, and that Hodges was still working. He further advised that a large number of local people were working in this operation (*id.*, p. 98),
>
> (e) On September 3, he advised that the business was doing $10,000 a day. Same statement repeated for September 16 (*ibid.*).

---

3. This allegation cannot be read with impunity as an indication these informants personally participated in the gambling activity alleged in this affidavit and which is the subject of this indictment.

Informant No. Two between July 16, 1973, and December 20, 1973, *advised* that two black males had recently arrived from Cleveland, were driven around by McGhee, and set up a lottery paying 500-1, then 600-1. Further, that this operation had recruited a number of local people, only Robert Hodges was named (*id.*, p. 99). Further it was said:

> (a) No. Two *learned* Ducky Moore was running this operation and that his boss was Virgil Ogletree (*id.*, p. 100),
>
> (b) August 9, No. Two advised that Hodges appeared to be doing well and was active and that as of August 9, 1974, Virgil Ogletree had been in contact with McGhee. As of August 9, 1974, Bobbie McGhee and Virgil Ogletree continued to participate (*ibid.*),
>
> (c) This informant supposedly estimated that as of August 9, 1974, the dollar value was between Five and Ten Thousand a day (*ibid.*),
>
> (d) Also, that as of August 9, 1974, Donald Moore had limited his functions (*ibid.*).

Informant No. Three advised on August 20, 1973, that Virgil Ogletree, a numbers operator, had recently expanded his operation to Atlanta, which he administered through Donald Moore, but kept a tight rein on him and was in constant contact with him. This informant is credited with having said Virgil Ogletree normally travels on a monthly basis from Cleveland to Atlanta in connnection with this lottery and transports money obtained from the lottery on his person (*id.*, pp. 100-101).

Informant No. Four is said to have advised that *on August 15*, Donald Moore was setting up the operation, and on December 23, 1973, he further advised that Virgil Ogletree was controlling the operation from Cleveland through Donald Moore. Further, that Virgil Ogletree utilized numerous phones to contact Donald Moore on a regular basis in order to maintain control of Moore and the business (*ibid.*).

Supposedly all of the information attributed to the various informers (none of whom admitted any personal participation in this alleged venture) was obtained by them either through (a) personal observations of, or (b) personal conversations with four of the named defendants—Ogletree, Donald Moore, Robert McGhee, and Hodges (App., p. 97).

Even from a routine inspection of the above statement it is apparent that much of what has been attributed to these informants cannot avoid being classified as merely their conclusions. This is so, aside from the fact that most of these conclusions are either speculative or erroneous. Even more important is the fact that some are blatant falsehoods.

All this makes for the ultimate contention made to the Court below that not only does this affidavit contain conclusory assertions—to an impermissible degree—but it also contains willful and false misrepresentations. These we still contend were made both *to deceive and to influence the issuance of the warrant within the meaning of the Court of Appeals decision in United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973). To be sure then the very real fear is that some of these asserted informers were phantoms, or, for reasons that could not be more apparent, they were conceived by the affiant for patently ulterior reasons.

This latter thought is exposed by the affiant's unwillingness to be fully candid in his affidavit, and by the deliberate inclusion in the affidavit of matters wholly unrelated to the establishment of probable cause (App., pp. 94-95).

(3)

As to the various alleged sources, again there is the blanket allegation of "personal participation in the numbers lottery business in Atlanta".[4] (*Id.*, page 96).

On the other hand, the essence of the information contributed (by Source Nos. One, Two and Three) is that in "June", "the early summer 1973", and "in the late summer or early fall" Donald Moore, or Donald Moore and Hodges, attempted to recruit them into "the new lottery." Each of these sources supposedly was able to identify a picture of Donald Moore.

The other statement attributed to Source No. Three was to the effect that the source "was aware that as of April 2, 1974, Robert Lee Hodges was still in . . . business and working for . . . [the] lottery operation."

Source No. Four is to be credited with having been made aware "in the fall of 1973" of this alleged lottery operation by Hodges. To this is added the affiant's conclusion that ". . . [Hodges] was working for Ducky in this lottery."

Other conclusory assertions, attributable either to this source or to the affiant, are: (1) that "the new lottery was paying substantially more on winning numbers"; (2) that John Allen was the collector or payoff man; (3) that the telephone was used extensively; (4) that he (the

4. Surely this allegation is distinguishable from the type that could be classified as being against their penal interest.

source) was aware that Bobbie McGhee was associated with this operation; (5) as of June 25, 1974, Hodges was working; and (6) a "James" or "Scott" also picked up and was a relative of either Moore or John.

Source Five supposedly became aware of this operation in 1973 through Hodges. Then we were given this source's belief that Virgil Ogletree, a name he had heard "mentioned", "was the boss of Ducky Moore," who (in the source's opinion at least) "was definitely the boss of the lottery operation in Atlanta". Source Five is likewise credited with a number of other conclusory, and opinion type, assertions all without even the pretense of an ultimate source therefor.

As to all these "sources", it seems clear beyond dispute, none of them supplied any information that could possibly be credited toward establishing probable cause to believe that Donald Moore had committed a federal crime, and was likely to have evidence, fruits, or instrumentalities of such crime at his "residence" or in his car on the date crucial to the survival of these warrants.

Viewed in this light, even given the idea expressed in *United States v. Ventresca*, 380 U.S. 102 (1965), that affidavits for warrants should be read "in a common sense and realistic fashion" (*id.*, at 108), the only appropriate way the contributions of these sources can be catalogued is as collective make-weight contentions that are entitled to no weight.

(4)

Returning then to the four unnamed informers. It is at once apparent, even if we credit *United States v. Harris*, 403 U.S. 573 (1971), with having held that an informer's self-incriminating statements tend to confirm re-

liability[5] (which of course *Harris* did not hold) it is again repeated that none of these asserted informers were credited with having admitted any personal participation in the so-called "Ducky Moore Lottery". Also, and this too is significant, nowhere in the affidavit is there set forth any indication as to any of these persons' "track record"—that is the number of percentages of successful searches, arrests or convictions based on information assertedly given in the past by these alleged informants.

Again, the affidavit in this case must be assessed and a determination made as to whether it provided a constitutional basis for the issuance of the warrant (1) to search the residence at 2815 Shoreland Drive, S.W., Atlanta, Georgia, and (2) for the search of Donald Moore's 1974 Cadillac automobile for the gambling paraphernalia enumerated in the affidavit as then (that is, September 23, 1974), "being concealed therein", and (3) for the actual seizure of the car itself.

In making the required judgments, it is, of course, a fact of life when dealing with undisclosed informers, the requirement is that the affiant must specifically and sufficiently set forth in his affidavit why the informer was reliable *and* how the informer obtained his information in the first place. *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

Of no mean importance to the required evaluation of the affidavit in this case, is the fact that the fulcrum information was referred to as having been supplied confidentially to the affiant. While we do not know whether these persons (if they do exist) are male or female, we do

5. In *Harris*, a close reading of the opinion shows less than a majority of the Court adopted either the notion that statements against informers' penal interest or statements as to the reputation of persons against whom the warrant is directed, could be credited.

know—at least presumptively—that they are the typical police informants from the criminal milieu. This being so, their contributions require cautious and skeptical scrutiny. As to this, it is a valid point that there is no premium on confidentiality except perhaps where confidentiality is required.

In this latter sense, an even more direct solution to the credibility problem here could have been solved if the asserted informants had appeared before the Court and taken the oath. Not only would we know they existed, but their factual contributions, if any, could have been appropriately identified from the affiant's obvious conclusions which permeate the affidavit itself.

Obviously then, if the informant is not offering direct evidence, but compounded hearsay, the entire evaluation process must begin again at the required level of remoteness. It is the primary informant that must pass along sufficiently detailed information so that the magistrate can make the proper judgments. This is so for the obvious reason that should a secondary informant be a mere conduit for hearsay thrice removed from a tertiary informant, the evaluation process is escalated even further (*Spinelli*, at 416, 423-425).

The sum total of the information furnished Judge Edenfield bearing directly on the credibility of the four informants reduces itself to the contention that they gave reliable information in the past. The problem then is to assess the adequacy of this assertion to establish their veracity.

Quite obviously, the recitation as to an informer's past performance in the case at bar did not give the magistrate the data on which to base an informed judgment. This is so, notwithstanding the conclusory allegation that infor-

mation supposedly supplied by them led to "arrests", "indictments", and other comparable statements. It did not tell the magistrate when that information had been furnished. It did not tell the magistrate whether, as a result of the arrests, *evidence* was turned up which any informant indicated would be turned up. It did not tell the magistrate whether the information from any informant was the exclusive predicate for such arrests, or whether it was but a minor contributing factor considered along with many other factors. It did not tell the magistrate whether those earlier arrests had ever been ruled upon, in terms of their legality and the adequacy of the probable cause upon which they were based. *If a particular informant was, indeed, deemed reliable for purposes of these earlier arrests, what were the supporting facts which made him reliable then?* Any such data would have been additionally significant for the magistrate here.

Of some significance here are the observations made by Justice Harlan in his dissenting opinion in *Harris*. Here he discussed the types of information which enter into the judgment of an officer, and should, therefore, be passed on to the magistrate:

> "Without violating the confidences of his source, the agent surely could describe for the magistrate such things as the informant's general background, employment, personal attributes that enable him to observe and relate accurately, position in the community, reputation with others, personal connection with the suspect, any *circumstances which suggest the probable absence of any motivation to falsify,* the apparent motivation for supplying the information, the presence or absence of a criminal record or association with known criminals, and the like." *Harris,* 403 U.S., at 600.

If the furnishing of good information in the past contributes to a belief in an informant's credibility, the furnishing of bad information in the past would certainly derogate therefrom. The policeman who works with an informant knows of his full batting average, not just of his successes. If a magistrate is furnished, selectively, with half-truths, he is intellectually crippled in terms of making the informed judgment contemplated by the Fourth Amendment.

While the above analysis clearly demonstrates there was no probable cause for the issuance of any warrant, even a warrant for the arrest of any of the persons mentioned therein, a more obvious fact is that none of the informants or sources mentioned even having *heard* that any of the particularized objects, for which the search warrant was issued, had been seen or were known to be present at any of the described premises. This is especially true insofar as the Shoreland Drive residence where Moore lived, is concerned.

Not only this, the only references to the Moore car, other than its description, relate to (1) the fact that Moore was observed on May 16, 1974, at the Hyatt-Regency Hotel where "the luggage of Frank Moten was placed in the trunk" and the car was driven away by Donald Moore with Hodges and Moten as passengers (App., p. 108). And (2) on July 22, 1974, at approximately 4:25 p.m., Moore parked this car in front of a cleaners where Scott was, and walked over and conversed with him through the window for about 5 or 6 minutes (*id.*, p. 109). Then, it was said, (3) that on August 30, 1974, Scott, who had been seen entering the Citizens Bank in College Park, Georgia "exited the bank ['at 9:29'] carrying something in his hand and re-entered his automobile". Moore drove into this parking lot, at 9:34 a.m., and parked next to

Scott's car. Scott then reportedly left his car, walked to the side of Moore's Cadillac, engaged him in conversation and then at 9:41, Scott supposedly gave him "a small packet." (*Id.*, pp. 110-111).

As to whether this supplied probable cause for the search of the Moore car for gambling paraphernalia, the answer is obvious. As to whether these allegations support the seizure of the car, the answer is even more obvious—if that is possible.

In substance then the affidavits fail to state any facts to support the affiant's conclusion that he had reason to believe that the Moore car contained the objects of the search. Other than the fact Moore owned this car and was only observed on three occasions using the car under circumstances that appear innocent enough, this car was not only searched but seized. We contend this was illegal; so much so that it should be ordered returned forthwith.

As to the search of the Shoreland residence, even here the affidavit fails to set forth any allegation of direct involvement of these premises in illegal ventures. Surely the fact that a party was supposedly given in the early part of 1973 does not amount to an allegation of the actual commission of a crime. And if it did, such a stale "fact" could only contribute toward the issuance of an arrest warrant. This is especially so since no mention was made of the presence of any contraband on the premises. See *United States v. Bailey*, 458 F.2d 408 (9th Cir. 1972).

In *Bailey*, the Court, in reliance on one of its earlier cases, concluded that "simply from the existence of probable cause to believe a suspect guilty [it does not follow . . .] that there is probable cause to search his residence." (*Id.*, at 412).

(5)

As to the assertion in the Affidavit that the "confidential sources" admitted personal participation in the illegal lottery business in Atlanta; the danger does exist that both of the Courts below may have, although *sub silentio*, credited this alleged fact in determining the existence of probable cause.

Given this very real possibility, *Harris* becomes most relevant. Here, this Court, by the narrowest margin possible, upheld the government's appeal from an adverse ruling by the Sixth Circuit. While the Chief Justice's plurality opinion was joined in by Justices Black, White, Stewart and Blackmun; it was for three expressed reasons, or combination of reasons, distinct from the total rationale expressed by the Chief Justice.

Of no mean importance, the *Harris* opinion, upon analysis, is shown to be divided into three parts. These give three separate reasons for crediting the informant upon whose information the affiant had relied. Two of these parts dealt with independent verification and the other with internal sufficiency of the information supposedly furnished by the informer. Only Justices Black and Blackmun joined the Chief Justice in all points. Justice Stewart joined only in Part I; whereas, Justice White joined only in Part III. Neither joined in Part II. So structured, the three principles for which *Harris* is most often quoted as being authority for, actually have a maximum support of four votes, three votes, and four votes respectively.

To be sure, it is quite possible a belated effort may yet be made to credit the confidential sources as having made statements against their penal interests. Since a majority of this Court is yet to adopt this aspect of *Harris*,

we would so regard any such contention. But, even apart from the cogency of the above analysis, the same result is achieved by a meaningful recognition of the fact that the statements themselves were not against the penal interest of any declarant. See *United States ex rel. Saiken v. Bensinger*, 489 F.2d 865 (7th Cir. 1973).

(6)

The question of probable cause for the issuance of the order for the touch-tone decoders and pen registers aside (See *United States v. Brick*, 502 F.2d 219 [8th Cir. 1974]), distilled, the affidavit shows the following eight calls relative to Donald Moore:

August 20—A call *from* Eugene Scott's residence
August 21—A call *to* Eugene Scott's residence
August 23—A call *from* John Allen's residence
August 24—A call *to* Eugene Scott's residence
August 29—*Three* calls *to* John Allen's residence
September 12—A call *to* John Allen's residence

Given the fact that Eugene Scott is the brother of Donald Moore, proof that in a three-week span three calls were placed between their residences at the indicated intervals hardly confirms a report (if such a report had been made) that gambling paraphernalia could be located both on the Shoreland Drive premises of Donald Moore and in his car (App., p. 145).

The calls as between the so-called John Allen phone and the Shoreland Drive residence are also explainable by the fact that the Allens were from Cleveland, as were the occupants on Shoreland Drive. Hence, it is not unusual that the parties and visitors to these respective homes could be in contact with one another in a way that did not relate to any gambling enterprise.

On the other hand, since there is no way to tell whether any of the calls were completed, or even who the callers were, to reason from the fact that the calls were attempted as between the respective points to the conclusion that such confirms a report that Donald Moore was involved in an illegal gambling enterprise is an obvious *non sequitur*. Not only this, it is equally fallacious to reason from these same premises that 18 U.S.C. §1955 was being violated and that there was probable cause to believe proof of this could be located on Moore's premises or in his car.

B. Probable Cause for the Issuance of a Warrant to Search One's Home and Car Is Not Sufficiently Established by an Affiant's Recitation That "In . . . [His] Experience . . ., Persons Engaged in Illegal Numbers Lotteries Usually Kept Lottery Items in Their . . . ['Headquarters, Residence'] and Vehicles".

Unless the Appeals Court's opinion is being misread, even when (as was the case here) there can be no possible showing that anyone ever observed the property sought by a warrant in a particular home; if a federal agent can swear that some unidentified informants told him that one of its occupants was the "boss" of a gambling operation, the residents thereof live in a home that is enveloped in probable cause. This is apparently so, even if the affiant reports that he had more recently been told by one of these informants that the particular resident "had limited his functions in the lottery" (App., p. 100).

In our view, one reading this affidavit in a realistic fashion and comparing it with the Appeals Court's discussion of this matter (*United States v. Scott*, 555 F.2d, at 527), would view the jump *from* a belief that Moore was the "boss" *to* the conclusion that he would have

gambling paraphernalia in his home as both unrealistic and unreasonable. This is especially so where, as here, there is *nothing* in the affidavit that even remotely suggested Moore ever had any gambling paraphernalia in his possession. So structured, the fact that the bottom line on all the surveillances made of Moore only showed him to be at home or in very public places, the expressed notions of the Appeals Court to the contrary, notwithstanding (*id.*, at 527-528), there is simply no basis in this record for the conclusion that "evidence of illegal gambling activity would be found in the Moore . . . [residence]" (*id.*, at 557).

Then, there is the Court's statement that "the information about Moore's activities during 1973 and early 1974" gave meaning to "the data concerning his activities in the weeks and months immediately preceding the submission of the affidavit" (*id.*, at 528). In addition to being an obvious attempt at after-the-fact justification, these statements show the Court has really missed the point. Simply put, if the question is probable cause to believe evidence of gambling activity was in Moore's home on September 24, 1974; informer information that "during 1973" Moore had some parties at his home during which some of the informers were solicited to participate in a lottery, does not contribute to the belief such was the case. And, just as surely, this use of this home cannot possibly "give meaning to the *data concerning his activities* in the weeks and months immediately preceding the *submission of the affidavit.*" (*Ibid.*). (Emphasis added).

As to this latter point, one needs only read the affidavit to be convinced it does not contain a factual basis for the statement emphasized above (See App., pp. 107-111). Stated another way, the Court's failure to tell us what "data concerning his activities" they were talking

about is amenable to a very short answer—none existed in the required context. On the other hand, if it is otherwise, then surely the Government response will enlighten us.

In making this contention, of no mean importance here is the argument made by the Government to the trial court in addressing this same issue. The fact that the position taken by the Government's trial counsel can be contrasted, so obviously, with the Court of Appeals' position should both emphasize and solidify the point here being made. Here trial counsel, in putting his best foot forward, argued:

> "We now address ourselves to the contention of Moore that the affidavit sets out no allegation of 'direct involvement' of his premises in the illegal venture (Moore's Brief, page 14). Suffice it to say that, as previously detailed in this brief, there were eight telephone calls between his telephone *in his residence* to either the telephone of John D. Allen or Eugene R. Scott between August 20 and September 12, 1974; there is ample probable cause to indicate the involvement of said Allen and Scott in the lottery; a party was held in Moore's residence in 1973 during which attempts at recruitment of lottery personnel were made; and both Allen and Scott visited Moore's residence in July, 1974. Every one of the four informants and five 'Sources' name Moore as the person in charge of the lottery in Atlanta. Finally, FBI Agent Burgess swears, based on his investigative experience from 1964 to the present time in Atlanta, the majority of which time was spent in gambling-type investigations (Affidavit, page 3), that persons engaged there 'keep' described wagering paraphernalia, money and safe de-

posit keys. The places where such keys are kept is described as 'on their persons, as well as in their headquarters, residences and vehicles' (Affidavit, pages 48-49). All of these facts certainly add up to probable cause that Moore, the local head of the lottery, would have lottery paraphernalia and records on his premises. Where else would the local 'box' of the lottery normally keep his records?" (App., p. 65).

In the wake of the Court's recognition that "admittedly, there are other places where gambling paraphernalia might have been stored" (*United States v. Scott*, 555 F.2d 522, at 527); the question then must be what "facts and circumstances" could the Court possibly have been relying on for its conclusion that there was probable cause to believe the gambling evidence could be found on the Moore premises. But, even this is not all. There is simply no basis—absolutely none at all—for the Court's statement that the affidavit "specifically set forth information indicating that Moore was, in fact, transacting lottery business at home" (*ibid.*). Because the above quoted statement is inaccurate to a fault (a fact cogently exposed by the fact that the Government is yet to make any such contention), to the extent the Appeals Court relied on this invalid conclusion, their judgment must be regarded as misguided.

C. Probable Cause to Justify the Issuance of a Search Warrant Must Be Determined As of the Time the Warrant Was Issued.

In the Briefs filed in support of the Motion to Suppress, the argument was made that, at best, Agent Burgess' affidavit *may* have supported the issuance of an arrest warrant for Donald Moore. A further contention was

that it failed to support a finding of probable cause to believe the items particularized in the warrant were located on the premises or in his car. And that the affidavit surely did not support, or even authorize, the seizure of this car.

Synthesized, the position of the Government has been that it was reasonable to infer that these items were in Moore's home (App., p. 65). And, it may still be their position that even though none of these items were in fact found in the car, a comparable inference was sufficient to support its seizure.

So that our position at this juncture may be clear, we still contend, the arguments as to the verity of particularly crucial averments aside, that the presence of certain other factors must again be reckoned with. These include the fact that there was no direct, or even indirect, representation by the affiant, even to the extent that it had been reported to him, that Donald Moore ever had any of the particularized items in his possession.[6]

Even more significant, if that is possible, no informant was credited even with being in Donald Moore's residence during the entire year of 1974. And none reportedly had ever seen any of these items in Donald Moore's possession, to say nothing of having seen any of them in his home. So postured, the inference that *the* particularized items could be located on the Moore premises or in his car, as drawn by the affiant and the Court issuing the warrant,

---

6. The only possible exception is the averment that on August 30, 1975, Gene Scott emerged from a bank at 9:29 a.m. and handed something to Donald Moore. The fact that Moore was then followed to the airport where he boarded a plane for New York, a fact not disclosed in the affidavit (although testified to at the trial by the agent involved) relegates this averment to the deceptive and misleading category (See Vol. 8, pp. 66-67, 95-96).

was patently unreasonable.[7] See *Sgro v. United States*, 287 U.S. 206 (1927), *Conti v. Morgenthau*, 232 F. Supp. 1004 (S.D.N.Y. 1964). Also relevant to this argument as being structured here are the cases of *United States v. Flanagan*, 423 F.2d 745 (5th Cir. 1970), and *United States v. Whitlow*, 339 F.2d 975 (7th Cir. 1964).

Again, the point being made is that the assertions in the affidavit, even as supported by the inferences reasonably drawn therefrom, simply do not support the conclusion that probable cause existed to search Moore's residence or to seize his car. Also see *United States v. DiNovo*, 523 F.2d 197 (7th Cir. 1975), and *United States v. Guinn*, 454 F.2d 29 (5th Cir. 1972).

A further aspect of the Court of Appeals' evaluation of the trial court's position on the motion to suppress perforce will entail a focus on the conclusory nature of the information supposedly supplied by the informers and sources, and the staleness even of these assertions (*Cf., Rosencranz v. United States*, 356 F.2d 310, 316-318 [1st Cir. 1966]).

As to this, the point has already been made that "it is not unreasonable to believe that [even] probable cause quickly dwindles with the passage of time." *Bastida v. Henderson*, 487 F.2d 860, 864 (5th Cir. 1973). So structured, a most consequential question is whether (assuming the allegations were true) there was probable cause for this search and the seizures *at the time* of the application for the warrant. We contend such was not the case. See *United States v. Neal*, 500 F.2d 305 (10th Cir. 1974).

---

7. The Government's argument that all this adds up to "probable cause that Moore, the local head of the lottery, would have lottery paraphernalia and records on his premises" (App., p. 65) must be weighed in the light of the statement in the affidavit that as of August 9, 1974, "Moore had limited his functions in the lottery" (App., p. 100).

D. The Accused Is Entitled to a Hearing As to the Verity of the Allegations in an Affidavit for a Search Warrant Upon His Challenge That It Contains Intentional Misrepresentations or Deceptive Representations of Material Facts.

Dealing specifically with the denial of the requested hearing on the Motion to Suppress, the specific contention was made that the "affidavit, upon which this warrant was based, contains material misstatements, factual inaccuracies, and other misinformation made therein for the purpose of over-persuading the Court to issue this search warrant." (App., p. 32).

Of no mean significance here is the fact that in one of its formal Responses (*i.e.*, the one made to the Motion for Disclosure of Identity of Informants) the Government specifically denied that any of the persons labeled "informants," in their search warrant affidavit, "were at anytime participants in, accomplices to, or conspirators in any of the criminal offenses alleged" in these indictments (App., p. 37). The Government further represented to the Court that of the five so-called "sources", four of them "did participate to some extent in *the* crimes alleged . . . at some periods during the period of time alleged . . ., *i.e.*, May 1, 1973, through February 25, 1975" (App., p. 38).

The fact that the Government in its Brief, filed in support of its formal Response to our motions, characterized the participation by these "sources" as "limited" (App., p. 42) must be regarded as a highly relevant circumstance. This is so, first of all, because the fact that James Jones was named in the indictment as an unindicted co-conspirator alone exposes the Government's position to be contradictory. Then there is the fact that unindicted co-conspira-

tor James Jones' FBI 302 statement (*id.*, p. 146) and grand jury testimony (*id.*, p. 151) expose him beyond any possible doubt to be Source No. 5 in the search warrant affidavit (*id.*, pp. 104-105).

Given these facts, plus the idea that *none* of the so-called "confidential sources," were contended in the affidavit to be either "reliable" or "credible"; and the inference becomes all too clear that the "limited participation" characterization ascribed to this "source" by the Government, was willfully designed to conceal from the court our entitlement to the pretrial disclosure of his identity under both *Brady* and *Roviaro*.

In any event, at least this much seems certain, unindicted co-conspirator James Jones being Source No. 5 makes it more probable than not that some of the other unindicted co-conspirators were at least "sources." If not this, then it must be a fact that unindicted co-conspirator James Martin was one of the named "informants." Should this be so, then the Government's statement (also in its Response Brief) that *none* of the named informants "were at any time participants in, accomplices to, *or conspirators* in any of the criminal offenses alleged" in this cause (App., p. 37 [emphasis added]) simply cannot survive the apparent thrust of the principle relied on by Judge Stevens (now Justice) in *United States v. Ott*, 489 F.2d 872 (7th Cir. 1970). Also see *United States v. Mele*, 462 F.2d 918 (2d Cir. 1972).

A further point here is the fact that the trial court, after denying us access to James Love Martin's statements made them a part of this record (Vol. 21, pp. 17-18). Seemingly this imposed on the Court the chore of making a specific determination as to whether these documents expose him to be an "informer" in spite of the stated position of the Government to the contrary.

As to these points, it is most significant here that neither the grand jury testimony of Jason Brown, James Martin and James Jones, nor their interview statements with Government agents, were furnished the defense prior to trial. It is also relevant that of all the witnesses who testified at this trial, only Jerry Pierce stated that he personally turned in actual number plays. His testimony showed him to be a "player" (Vol. 7, pp. 30, 146). He passed on his customers' bets as his own bets (*ibid.*).

Since it was apparent, at least from the point early in the trial when Pierce testified, that a contention was being made by the defense that those persons regarded by the Government as "writers or ribbons" were in fact "players", and as such could not be counted in determining the applicability of §1955 (*United States v. Marifield*, 515 F.2d 877, 881 [5th Cir. 1975]), the possible defense use of this evidence could not have escaped the Government's notice (*United States v. Keogh*, 391 F.2d 138, at 147 [2d Cir. 1968]). This being so, to the extent any of those persons (whose identity and evidence the defense had sought) regarded themselves as "players", such evidence was beneficial to the defense and should have been disclosed. See *Moore v. Illinois*, 408 U.S. 786, 794-795 (1972).

Not only this, given then the fact that unindicted co-conspirators Elizabeth Hailes and Jason Brown had referred to themselves as "players" (in their 302 statements), the Government's unwillingness to furnish either the 302 statement or the grand jury testimony of James Martin must be regarded most relevant. This is especially so in view of: Jason Brown's aggressive denial that he had attended any party (App., p. 171) of the type repeatedly referred to in the affidavit; of the role attributed by Jason Brown to Martin, who had solicited Brown's participation; and of Brown's version of Martin's stated motives for

involving himself in the alleged gambling enterprise (*ibid.*).

The point of the above conclusions, all of which are bottomed on indisputable facts, is that they support our specific contention that the apparently ill-advised, yet daring, deceptive representations by the Government (App., pp. 36-37, 42) were caclulated to (and did) influence the trial Court to deny the defense *any* exploration into the verity of the affidavit.[8] As to this, it may suffice to report we are still convinced such inquiry will perforce show the extent to which the assailed affidavit relies on impermissible factors. These include, but are not limited to, material misrepresentations and distortions by the affiant; as well as outright falsehoods by the various informants and sources—if in fact they exist.

In any event, the Government's categorical representation to the Court that the unnamed "informants" were *not* participants or conspirators is both highly significant and suspect (App., p. 37). On the other hand, these categorical representations by the Government certainly furnished no clue as to what now seems all too clear—that is, that Jason Brown and James Martin at least fall in this "source" category with James Jones, if they were not *informers*.

Roviaro v. United States, 353 U.S. 53 (1957), seemingly authorizes the defense to investigate the asserted credibility and reliability of participant-informers. This would have permitted the defense to explore the facts and circumstances underlying the basis of their asserted knowledge, and to compare what was attributed to them by the affiant

8. Here reference is being made to the Government's unequivocal position that none of the informers were sufficient participants in the charges made in this indictment (App., p. 37).

with the extent of their information. *Cf., United States v. Mele*, 462 F.2d 918 (2d Cir. 1972).

Again, since it is now apparent both from grand jury testimony and the 302 statement of Jason Brown and James Jones (the representations by the Government to the contrary notwithstanding [see *United States v. Ott*,[9] 489 F.2d 872 (7th Cir. 1970)]) that some of the informers and sources either credited themselves or were credited by the Government with being significant participants; due process, if it means anything in this context, at least requires a fresh determination of the suppression issue. In this should be included our request for a meaningful evidentiary hearing on our contention that the affidavit contained material misrepresentations of fact. Thus, we contend the trial court erred (at least at the points during the trial, if not earlier) when he denied the defense motion to suppress. The fact that this was done without a hearing is still another factor.

Again, the Record shows that both Ogletree and Moore moved the Court for the "Disclosure of the Identity of Alleged Informants" (App., p. 28). To repeat, one of the specific allegations in these motions was that "some of the information attributed to them [in the search warrant affidavit] is false" and that "the danger exists here that information and credibility factors . . . [had] been willfully attributed to non-existent informers and sources solely for the purpose of improperly prevailing upon, or otherwise

9. In *Ott*, the fact that Judge Stevens (now Mr. Justice Stevens) concluded that a material misstatement to the trial judge is the type of prosecutorial misconduct that requires a reversal, makes the issue as to the accuracy of the prosecutor's representations on this point significant. Also see *United States v. Mele*, 462 F.2d 918 (2d Cir. 1972), where the Government suppressed the fact that one of the defendants was an informer.

imposing upon, the magistrate to issue the search warrants in this case." (App., pp. 28-29).

The Government's *canned* response was that the motion "was not supported by oath at all, and . . . [was] therefore fatally defective." (App., p. 37).

Quite obviously, the Government, by taking this position, chose to ignore the fact that their affidavit failed to contain any specific allegations of fact which lent itself to specific denials. For example, all of the material allegations in the affidavit were couched in language which no direct denial by Moore could have reached the alternative possibilities.

Also, as was argued to the Court below, "*the Government most assuredly . . . [was] not entitled to the advantage of having . . . [Donald Moore] deny under oath that he had—for example—a conversation with an unidentified person during which he . . . [i.e., Moore] tried to persuade this person to be his partner in a criminal venture.*" And the point was made that "[i]f the Government's insistence that such denial be made under oath is indeed genuine, then at the very least the Government ought to prove the informant exists by specifically disclosing not only his identity but otherwise revealing *when* and *where* such conversations took place."

The essential point here, of course, is the fact that the Government has already conceded their informer information was supposedly obtained by them through "personal conversations with, or personal observations of, Moore and/or Defendants Ogletree, McGhee and Hodges." The Government's previous argument on this point has been that this assertion proves such "information . . . [was] obtained firsthand . . . and would not be 'conclusions' at all" (App., pp. 63-64). Apart from being a multi-defec-

tive reasoning pattern, the Government's willingness to rely on such a theory really emphasizes the absurdity of their *insistence that a denial of such conclusory and general allegations was required to entitle the accused to a hearing on his motion to suppress.*

If, as the Fifth Circuit reasoned in another connection, the adequacy of the Government's denial (of a contention that one engaged in illegal conduct) depends upon the specificity of the allegation that such occurred, *United States v. Stevens*, 510 F.2d 1101, 1105 (5th Cir. 1975), then it should follow that the adequacy of Moore's contentions here (that the affidavit contained untruths and the like) to entitle him to a hearing should be gauged by a standard that relates itself to the specificity of the affiant's allegations upon which probable cause is said to be based.

But even this is not all: the Government apparently convinced the trial court that the defense was not entitled to the identity of these informants because to do so could possibly endanger their personal safety and that there was a requirement on the defense to show a "most urgent and overriding necessity for disclosure" (App., p. 43).

As to the Government's contention below that our quest for the disclosure was based solely on a desire to use such information "to attack the probable cause affidavit" (App., p. 44); the point here must be made that such was not our sole purpose. But even if this were so, the Government's unqualified reliance on *McCray v. Illinois*, 368 U.S. 300 (1967), may have been sorely misplaced in view of *Alderman v. United States*, 394 U.S. 167, 181-184 (1969). While *Alderman* and *McCray* are arguably distinguishable, both focus on whether an accused has a constitutional right to demand information that does not necessarily relate to his guilt or innocence, but to

the manner in which evidence against him was gathered. More specifically, *in Alderman, the Court held that confidential evidence must be disclosed when it allegedly taints the prosecution's case.* Arguably then, to the extent *Alderman* allows such inspection, it limits *McCray,* which refused to disclose the identity of certain informers to testify as to an allegedly illegal arrest and search. Stated another way, our contention is that in face of Moore's *fourth* amendment right under *Alderman* to inspect otherwise privileged information to show it tainted the case against him, a good question exists as to what remains of the *McCray* bar of inspection of the same information to show the search was illegal.

This brings us to the position taken by the Appeals Court on these issues herein. It is our view that the Court's analysis ignores some salient facts here involved. Stated another way, the Court's opinion on this point is readily assailable as being misdirected.

To begin with, no one disputes, as the Court aptly determined, that the cases tend to require a preliminary showing that some allegation in an affidavit is false before a hearing is required (*id.*, at 528). But this principle does not, in our judgment, reach the issue postured by the facts in this case.

A critical aspect of this issue (as was argued to both the Courts below) is "how does one deny under oath that he had—for example—a conversation with an unidentified person during which he tried to persuade that person to be his partner in a criminal venture". Add to this, the fact that the affidavit asserted that the informers obtained their information on the basis of "either personal observations of, or personal conversations with Virgil Ogletree; Donald Moore, . . . Robert McGhee . . .; and/or

Robert Lee Hodges . . ." (App. 97) and it becomes even clearer that a specific denial by Moore could not possibly reach those alternatives, created by the affiant's choice of words, to which he was not privy.

All this being so, it seems most unfair to sanction the use in this case of vague and unspecific allegations that defy a specific denial and then penalize the accused for not having made a specific denial.

Again, the contention is being made that deceptive allegations were made in the affidavit, and that a sufficient contention was made to have entitled us to the required hearing. This fact became all the more clear when one of the "informers" and "sources" was exposed as an asserted participant in the charged lottery—a circumstance that was *wilfully* concealed from the defense, in spite of specific requests for such information during the discovery phase of this case. (Counsel has argued that James Martin, *whose statement was not given the defense,* must have been either an informant or a source. This is yet to be denied by the Government. This is so despite the fact that all of the parties to this lawsuit with the exception of the defense and their counsel are privy to the contents of the Martin statement.)

II. THE ADMISSION OF TESTIMONY BY CERTAIN ALLEGED UNINDICTED CO-CONSPIRATORS VIOLATED OGLETREE'S RIGHT OF CONFRONTATION AND THE HEARSAY RULE.

A. Mere Association With Members of a Conspiracy Is Insufficient to Establish a Person's Participation; Hence, Membership Can Only Be Inferred Where the Accused Not Only Had Knowledge of the Conspiracy But Did an Act in Furtherance Thereof.

Concedely, under the co-conspiracy exception to the hearsay rule, testimony as to extrajudicial statements (here the various statements supposedly made by Scott to Stewart and by Moore to Pierce and to Julius Lyles) may be admitted if it is fully established by evidence other than such hearsay that the accused (here, Ogletree) was involved in a criminal conspiracy with the declarant (here, Scott and Moore). *United States v. Menichino,* 497 F.2d 935, 942 (5th Cir. 1974); *United States v. Appollo,* 476 F.2d 156, 159 (5th Cir. 1973).

However, in this case, it seems all too clear that there was insufficient evidence apart from these utterances to establish any conspiracy or joint criminal venture between these asserted declarants and Ogletree.

It has, of course, been admitted that Ogletree knew both Moore and Moten. The evidence showed Ogletree and Moore were friends of long standing. The same was true of Ogletree and Moten. There was also evidence showing Ogletree knew James Harding. On the other hand, there was *no* evidence that Ogletree knew, had any contact, or even talked to any of the other alleged co-conspirators—save and except Lyles and Stewart. As to Lyles, who testified as a Government witness, it is important to note, he did not place any criminal connotation on his contacts or conversations with Virgil Ogletree (Vol. 7, pp. 66, 97). And, Stewart admitted she and Ogletree never talked about anything (Vol. 5, p. 152). This latter fact becomes all the more important in view of Ogletree's acquittal of the travel count which involved Stewart.

It has, of course, been specifically recognized that "mere association with members of a conspiracy is insufficient to establish a person's participation in the conspiracy". *United States v. Diez,* 515 F.2d 892, 901 (1975). Also see *United States v. Oliva,* 497 F.2d 130, 134 (5th Cir. 1974); *United States v. Suarez,* 487 F.2d 236, 239 (5th Cir. 1973); and *United States v. Cantrone,* 426 F.2d 902, 904 (2d Cir. 1970).

Of no mean significance then is the Government's Response to Ogletree's contentions that the admission of these extrajudicial utterances was improper, and that there was insufficient evidence to support his conviction. Here, it was argued:

> "The testimony of Sandra Jackson and Mary Lou Stewart provided direct proof of his complicity and guilt. Further, Ogletree's own statements prove his relationship to co-defendant Moten as well as show his true occupation to be that of a 'professional gambler'. Additionally, the evidence of his travels to Atlanta and subsequent meetings with the other co-conspirators prove his ownership interest in the lottery." (App., p. 86) (emphasis supplied).

As to these points, surely the fact of Ogletree's mere relationship with Moten (in a way that was not connected to the charges in this case) was not evidence, as distinguished from supposition, even when coupled with Ogletree's reference to himself as a "professional gambler"

(Vol. 12, p. 146). And, this no more proves Ogletree's "ownership interest" in this lottery, than such "evidence" would prove ownership by any other "professional gambler" who happened to be a friend of one whom the Government can prove was a conspirator in, or operator of, an illegal gambling enterprise.

A further point is that being a "professional gambler" is not necessarily an illegal profession. This is especially so since it is an established fact that people do make substantial earnings playing the horses, betting on professional sports (in places where it is legal to do so), and in matching their wits against the laws of chance in places like Vegas and Puerto Rico.

The Government has contended that Jackson and Stewart provided *direct evidence* against Ogletree (App., p. 86). As to this, the Record could not be clearer, Jackson did not contribute any evidence from which an inference could be drawn that Ogletree was involved in the numbers business in Atlanta. While she did testify that she and Ogletree were passengers in the car when Moten took Stewart to the airport, her testimony supports that of Mary Stewart that Ogletree did not involve himself in any conversations that may have taken place between Moten and Stewart.[10] Then, as argued below, the fact of Ogletree's acquittal on the count which charged him with having criminally participated in Stewart's travel from New York to Atlanta, arguably should estop the Government from making a contrary contention.

---

10. Jackson's testimony that Ogletree had told her he had given Moore money on "several occasions" during "the entire tenure of their friendship," which money Moore had lost at the race track (Vol. 6, p. 68), no more justifies an inference that such money was intended for the numbers game *in Atlanta*, than it does an inference that it was lost at a race track *in Atlanta*.

During the course of the trial, and again in the Motion for Judgment of Acquittal, in addition to the contention that there was insufficient evidence—in fact there was none—to show that Virgil Ogletree was a member of any conspiracy, such as would make admissible against him (as having been uttered in furtherance thereof) the hearsay testimony to which reference has been made; it was also argued that there was insufficient evidence to support his conviction for any offense.

While we concede that the Fifth Circuit, in *Park v. Huff, infra,* seemingly indicated it would only require "A showing of a likelihood of an illicit association between the declarant [here, Donald Moore and Eugene Scott] and defendant" Ogletree, which circumstance could be proved by "totally circumstantial evidence" (506 F.2d, at 859); the fact still remains even proof of this ilk was missing here. Thus, it seems as clear here as the reverse did in *United States v. Lawson,* 523 F.2d 804, 806 (5th Cir. 1975), that there was no evidence from which the jury could conclude the crucial remarks (supposedly made by Moore and Scott) were made "with the knowledge and on behalf of" Ogletree.

As to Ogletree's friendship relationship to Moore, and even to Moten, such is not a fact that translates itself into an illicit association simply because they were seen in the lobby of a busy downtown Atlanta hotel. The same is true of the fact that on one of these occasions Moore made hotel reservations for Moten, who occupied for a few days a room next to a Virgil Ogletree in the same hotel. See *United States v. DiRe,* 332 U.S. 581, 593 (1948); *Cansey v. United States,* 352 F.2d 203, 207 (5th Cir. 1965).

Here, the rule that has emerged is that "mere association with members of a conspiracy is insufficient to establish a person's participation in the conspiracy." *United States v. Diez,* 515 F.2d 892, at 901 (5th Cir. 1975).

In line with the position here being taken is the case of *United States v. Cianchetti,* 315 F.2d 584 (2d Cir. 1963). In *Cianchetti,* the facts showed that not only did Cianchetti know of the charged conspiracy (a fact not shown here to be the case with Ogletree), he had on occasions participated in discussions with others who were proven to be conspirators. Yet, the absence of any evidence showing Cianchetti acted in furtherance of the criminal venture was deemed to be crucial. Also, see *Miller v. United States,* 382 F.2d 583 (9th Cir. 1967).

Still another case, also from the Ninth Circuit, is that of *United States v. Calaway,* 524 F.2d 609 (9th Cir. 1975). There the Court, while affirming the convictions involved, made several of the points here being urged. Not the least of these is that the mere association with people who are conspirators is not an offense (*id.,* at 614), and the idea that some act by the accused in furtherance of the charged conspiracy is required.

Of no mean significance here, this Court in *United States v. Nixon,* 418 U.S. 683 (1974), specifically reasoned that:

> "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy." (418 U.S., at 701).

An arguable point, gleanable from *Nixon,* is the further reference that "as a preliminary matter, there must be . . . *substantial, independent evidence of the conspiracy,* at least to take the question to the jury" (*id.,* n. 14 [emphasis added]). This language may very well result in a modification of the apparent rule in the Fifth Circuit, which evidently requires only that the independent evidence "be sufficient to support a finding by the jury that the defendant was himself a conspirator." *United States v. Oliva,* 497 F.2d 130, at 133 (5th Cir. 1974).

However, even under the standard as articulated in *Oliva,* the crucial question is "whether from the independent evidence offered; reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the defendant's innocence" (*id.,* at 134). This question, we contend, should have been answered in favor of Ogletree.

B. Where Evidence Is Offered Against an Accused That Cannot Be Cross Examined, the Prosecution Must Demonstrate Such Evidence Had an Independent "Indicia of Reliability."

The thrust of the petitioner Ogletree's argument here is that the jury's consideration of certain testimony, concerning three conversations supposedly had between (1) Moore and Pierce, (2) Moore and Lyles, and (3) Scott and Stewart, violated both his right of confrontation and the hearsay rule. In making this argument, it should be noted that, as was stated in this Court's plurality opinion, in *Dutton v. Evans,* 400 U.S. 74 (1970), "the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of the fact [has]

a satisfactory basis for evaluating the truth of the prior statement." (*id.*, at 89).

The statements attributed to Gene Scott and Donald Moore by Mary Stewart, Jerry Pierce and Julius Lyles contained the implied assertion that Virgil Ogletree was somehow involved in a numbers operation with James Harding (based on the Scott statement) *and* Donald Moore (based on the statement supposedly made by Donald Moore). The truth of this implication depends not only on whether Gene Scott and Donald Moore made the statements, but on whether the statements (if made) were reliable. This question turns on the answers as to (1) whether there was "a satisfactory basis for evaluating" its truth (*California v. Green*, 399 U.S. 149, 161 [1970]); (2) whether cross examination could have possibly exposed the statements, if made, to be unreliable (*Dutton v. Evans*, 400 U.S., at 89); and (3) whether the statement itself contained a sufficient "indicia of reliability." (*Ibid.*).

It may suffice here simply to say that Ogletree, in this case, like the defendant in *Dutton*, was only able to cross examine the witness, who purportedly was quoting the respective declarants, on the factual questions as to whether the witness actually heard the particular statements which arguably implicated him. Neither was able to cross examine the alleged declarants.

In the context of this case, the confrontation clause guaranteed Virgil Ogletree, since there was no way he could cross examine or otherwise confront the asserted declarants (*i.e.*, Scott and Moore), that he would have a satisfactory substitute for testing the accuracy of the statements imputed to them by witnesses testifying in their own self interest. In this sense, the Government was required to demonstrate that this evidence had such

an independent "indicia of reliability" that cross examination would serve no useful purpose.

While there is no question as to the admissibility of such conversations as against the asserted declarants (See *Bruton v. United States*, 391 U.S. 123, at 128 [1968]), this surely does not end the matter here. Nor does the undeniable fact that as to Ogletree the statements were hearsay, control the situation. See *California v. Green*, 399 U.S. 149, 155-156 (1970).

Given (1) the testimony by Mary Stewart, at the deposition and repeated by her at the trial, that Eugene Scott never told her he worked for Virgil Ogletree (Vol. 7, p. 157); (2) the testimony by Jerry Pierce that he had no knowledge that Virgil Ogletree was involved in the numbers in Atlanta and that he [Jerry Pierce] could only assume such to be the case (Vol. 7, pp. 156-157); as well as (3) the statement by Julius Lyles to the effect that he had no idea whether or not Ogletree was connected with Donald Moore in the lottery operation (Vol. 7, pp. 97-98), it becomes all too obvious that such "indicia of reliability" was surely lacking here. In any event, at least this much seems certain, none of the witnesses to whom these remarks were supposedly addressed regarded the statements as a sufficient indication that Virgil Ogletree was actually involved. In fact, all of them (*i.e.*, Mary Stewart, Jerry Pierce and Julius Lyles) specifically denied having knowledge of any involvement by Virgil Ogletree in their numbers activities.

It is also being contended here that the admission of the various statements (to which reference has been made) violated Ogletree's right of confrontation. In making this point, we are not oblivious to this Court's rejection of the argument (in *California v. Green*, 399 U.S. 149,

155-156 [1970]) that the Sixth Amendment codified common law hearsay principles.

Since Ogletree could not cross examine either Scott or Moore as to whether they made the remarks attributed to them, the question then is whether his ability to cross examine Stewart, Pierce and Julius Lyles, on the factual question as to whether they actually heard these asserted statements made, furnished a satisfactory basis for evaluating the underlying truth of the statements themselves. But even this, of course, does not end the matter; the question then becomes whether the circumstances surrounding the specific utterance gave it a sufficient "indicia of reliability" to place it before the jury.

In dealing with comparable utterances, in the context of a state court prosecution, a panel in the Fifth Circuit (*Park v. Huff*, 493 F.2d at 23, *rev'd*, 506 F.2d 865 [5th Cir. 1975]), noted that a number of possible reasons exist for the insertion of a particular person's name by a conspirator into a crucial conversation. As was true there, such may have been "gratuitous", or it may have been done to add the named person's "prestige to the undertaking." Then too the name could have been inserted by Donald Moore, if it was, to avoid exposing himself to continued pressure for loans or better deals by his (Moore's) subordinates.

Given the further fact that the entire testimony of the witnesses to these asserted statements verifies each either gave perjurious testimony in this case, or false statements to the FBI; proof even that the statements were made is not beyond dispute. Then there is the further fact that all of these witnesses had strong motives to fabricate.

On the other hand, while it could possibly be inferred that Donald Moore had personal knowledge of any involvement by Virgil Ogletree, no basis exists in the Record for imputing such knowledge to Gene Scott. Hence, merely having permitted Virgil Ogletree to cross examine Mary Stewart cannot be said to have satisfied his confrontation rights. And the sincerity of the statements attributed to Moore was not supported by any "indicia of reliability."

Still another point here is the fact that as to the statement supposedly made by Donald Moore to Julius Lyles (Vol. 7, p. 59), the Record fails to show it to have been made in furtherance of any criminal venture. This conclusion seems irresistible in face of Julius Lyles' negative response to the question which asked him if Donald Moore indicated why he (Donald Moore) "would have to talk to Virgil" (*id.*, at 60) about the money Lyles tried to borrow for the stated purpose of "open[ing] up a barbeque joint" (*id.*, at 59).

C. The Admission of an Extrajudicial Statement Imputed by a Prosecution Witness to a Non-Testifying Declarant, Which Statement Was "Crucial" to the Prosecution and "Devastating" to the Defense, Constitutes a Violation of the Right of Confrontation.

To begin with, the hearsay exception which permits a co-conspirator's extrajudicial, or out-of-court, statements to be admitted when made in furtherance of the conspiracy is certainly not of recent vintage. See, *e.g.*, *Lutwak v. United States*, 344 U.S. 604 (1953). On the other hand, the existence of this rule does not entirely resolve the admissibility of the asserted declarations in this case. Values implicit in the Sixth Amendment right of an ac-

cused "to be confronted by the witnesses against him," must perforce be reckoned with.

As to this, it is beyond dispute, the same considerations which generate the hearsay rule support and animate the right of confrontation. Yet, it seems to be all too clear that this apparent similarity of values does not result in the exclusion of all hearsay that may be violative of the confrontation clause, any more than it makes admissible all testimony that qualifies as an acceptable exception to the hearsay rule.

In dealing with this specific point this Court has explicitly held that:

> "While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; *indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.*" *California v. Green*, 399 U.S. 149, 155 (1970) (emphasis added).

In the absence then of an automatic rule of equivalence between the hearsay rule and the right of confrontation, meaningful assessment is required as to the extent to which certain confrontation values may have been violated by the admissions made here.

Given the fact that the asserted declarants could not be subjected to be cross examined, an event which would

have at least exposed their demeanor to the scrutiny of the jury, the "mission" of the confrontation clause usually served by cross examination could not be accomplished here. Stated another way, the confrontation values, of which the Court spoke in *California v. Green, supra*, were not served in any manner.

Even here, we concede that a failure to serve confrontation values may not be fatal where the hearsay testimony is neither "crucial" to the prosecution nor "devastating" to the defense. *Dutton v. Evans*, 400 U.S. 85, 87 (1970).

The evidence admitted against Ogletree here, in addition to being both "crucial" and "devastating", was also unreliable. For, certainly "[i]t is . . . [conceivable] that cross examination could have shown that . . . [Gene Scott, one of the asserted declarants] was not in a position to know whether or not . . . [Ogletree] was involved in . . . [this numbers game]." *Dutton v. Evans, supra*, at 88. Nor can the conviction be sure that cross examination of Moore could not have shown (if in fact he made the statements attributed to him) that they were made simply to conceal his own role as the sole "banker" of this operation.

Here too, of the various declarations here involved, none were corroborated by other testimony tending to establish the existence of a conspiratorial relationship between Ogletree and the declarants. Indeed, the fact that they were testified to by witnesses who had ample cause to falsify is a further consideration in favor of rejection.

Not only this, perhaps even more important, unlike the situation in *Dutton*, under the facts here none of the out-of-court declarations was "of peripheral significance at most" (*id.*, at 87). Instead, only these witnesses offered any testimony involving Ogletree in the specific charges in

this case,[11] if that is what their testimony did, in fact, do. In any event, the confrontation issue arises here because "the jury was invited to infer that . . . [the nontestifying declarants] had implicitly identified . . . [Virgil Ogletree as the banker of this numbers operation]" when they referred to him in their conversations with these witnesses (*id.*, at 88).

In dealing with the specific contentions made under this segment of our Petition, the Court of Appeals rather perfunctorily noted that Ogletree had made the "claim that the admission of this testimony [*i.e.*, the hearsay declarations of Moore and Scott to Pierce, Lyles, and Stewart] violated his right of confrontation" (555 F.2d, at 531, fn. 7). Significantly, the Court expressed the view that "these declarations tied Ogletree to the lottery" (*id.*, at 531). And, the Court reasoned that "substantial" independent evidence of his membership in such conspiracy was supplied by the "reasonable inferences [drawn] from coincidental appearances and statements as regular as his" (*ibid.*).

While the phrase "coincidental appearances and statements as regular as his" is most confusing, the Court must be saying that Ogletree's four or five visits to Atlanta, in a period of approximately a year and a half, amounted to "regular" visiting. Regardless, any such conclusion must be weighted by the fact that, during this period, Ogletree also visited his girlfriend who lived in Atlanta. Since it was not shown that his girlfriend, who testified as a Government witness, had any connection with the lottery, it can hardly be said that their relationship was not as sufficient a reason for his "regular" visits. As to the phrase

11. In *Dutton*, the evidence against the defendant consisted not only of eyewitness testimony, but testimony by one of the participants who fully involved Evans in the crime (See *Park v. Huff, supra*, at 861).

"statements as regular as his", since the only statement in this entire case that was attributed to Ogletree was his admission to being a "professional gambler", the Court's use of this phrase is beyond divination.

In any event, while the Appeals Court would resolve our hearsay and confrontation arguments on the basis of our footnote, 555 F.2d, at 531, fn. 7; the propriety of the Court's admission of evidence objected to on this basis is, in our judgment, the most critical issue raised by Ogletree. For, it cannot be denied, without this very evidence, the case against Ogletree dissipates. Indeed, the Court of Appeals specifically concluded that "these declarants clearly tied Ogletree to the lottery and made it clear that his periodic trips to Atlanta to meet lottery operators were for the purpose of supervising and checking on the operation." (*Id.*, at 531).

To be sure then it is our view that the admission of these three isolated statements, contended to have been considered by the jury in violation of both the hearsay rule and Ogletree's right of confrontation was not resolved in accordance with fundamental criteria.

Based on the arguments made above, the law cannot possibly support the apparent thrust of the Appellate Court's rationale, which suggests the confrontation rights of an accused can be routinely satisfied where the evidence is otherwise admissible. In our judgment, while it is true, as the Court concludes, that "the hearsay rule does not automatically bar all out-of-court statements by a defendant in a criminal case" (*id.*, at 531, fn. 7), the fact that evidence can hurdle the hearsay barrier does not automatically make it admissible. As argued in our original Brief (*Appellant's Brief*, p. 51), it is also the law that the confrontation rights of the accused must, in any event, be reckoned with.

In our judgment, values implicit in Ogletree's confrontation rights were not accommodated as a predicate for the admission of the evidence assailed in this argument.

III. THE COURT ERRED OR ABUSED ITS DISCRETION IN FAILING TO REQUIRE THE GOVERNMENT TO FURNISH, IN RESPONSE TO VARIOUS DEFENSE MOTIONS AND REQUESTS, CERTAIN EVIDENCE WHICH WAS ESSENTIAL TO THE PREPARATION OF THEIR DEFENSE. THE PETITIONERS WERE FURTHER DENIED DUE PROCESS AS A RESULT OF THE GOVERNMENT'S SUPPRESSION OF THIS SAME EVIDENCE TO WHICH THE DEFENSE WAS ENTITLED UNDER BRADY v. MARYLAND AND ITS PROGENY.

A. In Multiple Defendant Cases the District Court Judge Should Solicit, at Least in Camera, Sufficient Disclosure to Permit Him to Properly Dispose of the Various Pretrial Motions Filed in Connection With Defense Preparations for Trial.

Viewed from the posture of hindsight, given the statements and/or grand jury testimony by James Jones, Jason Brown, James Love Martin, Elizabeth Hailes, the situation here is not unlike that of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, as was the case here, there was an affirmative request for evidence that could be put to beneficial use by the defense. The prosecution gave Brady some material but failed to disclose a statement by the co-defendant that tended to dilute Brady's culpability. The exact situation occurred here, the Government failed to include in its discovery, statements made by various "co-

conspirators" who characterized themselves as "players" (App., pp. 146, 164).

An essential aspect of *Brady* was the Court's verbalization of the concept that the prosecution has a duty to insure that "criminal trials are fair" by disclosing evidence favorable to the accused, especially when the request is made. This being so, the Government's task here must be to convince this Court, in spite of the odds, (1) that it was proper for its counsel to willfully conceal (during the pretrial stages of this case) the fact that at least one of the unindicted "conspirators" was also one of the "sources" whose information was utilized as a predicate for the issuance of the search warrants in this case, and (2) that they could properly deny that *any* of these "sources" were participants so as to avoid any possible impact by *Roviaro v. United States*, 353 U.S. 53 (1957), without impairing a fair trial.

In our judgment, these indisputable facts show a deception was consummated here. And, while it was just as inappropriate to foist on the Court a crucial representation as factual (which arguably includes those exposed by the Jason Brown papers, and those of James Love Martin) translates into an obvious stratagem. The fact that it was apparently designed to make it more difficult for the defense to amplify its attack on the facial sufficiency and the substantive verity of the affidavit, *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973), in face of the Government's expressed position that none of the allegations in the affidavit were specifically disputed, must be deemed a crucial circumstance.

The point of the cases of the *Brady* ilk, and we contend this to be one, is not limited to the exculpatory nature of the suppressed evidence but by the prosecutor's knowledge

of the false impression created in its absence. Stated another way, an accused need only show that the prosecutor's conduct was willful, not that the suppressed information would have helped him. See *Nash v. Illinois,* 389 U.S. 906, 906-907 (1967) (Fortas, *J.*, dissenting from the denial of certiorari).

While the fact that the defense could not have obtained this evidence except by compelling the Government to disclose it, the corollary here is that unless this material had been forced to light by the defense it would have remained in the exclusive possession of the Government.

The above analysis supports, in our judgment, the contentions that: (1) the Court erred in failing to require the Government to disclose the identity of its so-called informants, and (2) evidence beneficial to the defense was suppressed.

Even more specifically, these petitioners contend they were unfairly hindered in the preparation of their defense by virtue of the Government's unwillingness, sanctioned by the Court, to make available to them all the material to which they were entitled under *Brady*. Here, it should be noted that the Government's theory throughout has been that Ogletree was a "banker" (App., p. 6), and that Donald Moore was his representative.

The Government's theory has continued to be that the unindicated co-conspirators were proper persons to be counted in determining whether the five-man, thirty-day requirements of §1955 were met, and that they were in fact violators of §371; so much so, that their utterances in furtherance thereof were admissible against these petitioners.

So structured, these petitioners, in addition to requiring the Government to prove their involvement, surely

could show, if such were the case, that these unindicted persons were merely "players" or "customers", and as such could not properly be counted. In this sense, evidence in the possession of the Government which tended to support this thesis—that is, that any of these alleged co-conspirators were merely customers, or players, quite obviously must be classified as evidence which the defense could put to beneficial use.

While one can rationalize the trial court's failure to take a more aggressive position with reference to the various defense motions, the fact still remains suppressed material was eventually flushed out during the trial. Even after it was inspected *in camera,* the Court failed to expose *all* of the material to the defense. Not only this, the trial Court made it clear that a rather immediate position had to be taken by the defense with reference to the use to which it intended to put this material. As to this, we contend the court erred (if not sooner, at least when the motion for the production of this material was made at the close of the Government's case [Vol. 17, p. 43]). In the wake of this Motion the Government was required by the Court to surrender to the defense the 302 statements and the Grand Jury testimony of James Jones, Jason Brown and Elizabeth Hailes.[12]

Surely then, this much now seems certain, had the Court made this evidence available at that time, the defense would have been in a much better position to evaluate and make the appropriate judgment. *Levin* v. *Clark*, 408 F.2d 1209 (D.C. Cir. 1967).

Specifically then, the arguments being made are: (1) that the Court erred in failing to require the Government

---

12. As shown elsewhere the Court refused to permit counsel to inspect the statements of James Martin.

to produce this material prior to trial, and (2) that the Court abused its discretion in failing to allow the defense to inspect the statements and grand jury testimony of James Martin.

As to this latter point, we remain convinced, as argued elsewhere in this Petition that an examination of this material in the light of the indictment, the search warrant affidavit, and the Government and defense theories, will lead this Court to reject the trial judge's stated position that they contained nothing that ought to be made available to the defense.

Hopefully, then this Court will agree that where, as here, the beneficial use by the defense of evidence in the Government's possession could not have escaped the prosecutor's attention, due process is denied when he fails to make it available. This circumstance is further aggravated when the suppression of this material is aided by affirmative representations to the court such as were made here, which were designed to camouflage the existence of such evidence.

B. The Failure to Disclose Evidence Whose High Value to the Defense Could Not Have Escaped the Prosecutor's Attention, Especially When Coupled With Affirmative Representations by the Government That Were Designed to Camouflage the Existence of Such Evidence, Justifies a Finding of the Suppression of Evidence Within the Context of Brady v. Maryland.

Both Ogletree and Moore contend they were unfairly hindered in the preparation of their defense by virtue of the Government's categorical representation, doubtless relied on by the Court (Vol. 17, pp. 48-49; Vol. 21, p. 7), that the Government had made available to the defense

all the material to which they were entitled under *Brady*. In fully gauging this contention it should be again noted the Government's theory was that Ogletree was a "Banker" (App., p. 6) and that Donald Moore was the Boss of the "Ducky Moore Lottery". Add to this the Government's further position that the unindicted "co-conspirators" were proper persons to be counted in determining whether the five man, 30 day requirements of §1955 were met, and that they were in fact violators of §371. Assuming this to be so, the Government has reasoned that utterances made by any of the "conspirators" in furtherance of their respective roles were admissible against the others.

The defenses interposed by these petitioners, in addition to requiring the Government to prove their criminal involvement with the others (as charged), was to show that, in addition to some of the named defendants the "unindicted" persons were not includable in the ambit of §1955. So structured, it can only be that any evidence in the possession of the Government, which tended to support this thesis—that is, that any of the alleged co-conspirators were merely customers or players (See *United States v. Box*, 530 F.2d 1258, 1262 [5th Cir. 1976]) —necessarily must be classified as evidence the defense could have put to beneficial use.

Thus, it may suffice here simply to say that even if the trial Court were correct in failing to take a more aggressive position with reference to the various pretrial defense motions, the fact still remains the statements and Grand Jury testimony of Jones, Brown and Hailes were eventually flushed out during the trial (Vol. 17, pp. 43-48) and were inspected *in camera* by the Court (Vol. 21, pp. 2-6). When this occurred the Court required that a rather immediate position had to be taken by the defense with reference to the use to which it intended to put this evidence (Vol. 21, p. 15).

As to all this, at least this much now seems certain, had the Government made this evidence available at an earlier time the defense would have been in a much better position to evaluate and make the appropriate judgment as to any possible use to which the resultant disclosures could have been put (*Levin v. Clark*, 408 F.2d 1209, 1222 [D.C. Cir. 1967]). The question then is, can there be a defense to the contentions that the Court erred in failing to require the Government to produce this material prior to trial. The same is true of the proposition that the Court abused its discretion in failing to allow the defense to inspect the statements of James Martin.

As to this latter point we remain convinced, as has been argued elsewhere in this Petition that any meaningful examination of these documents (including Martin's 302 and Grand Jury statements which were sealed but made a part of this Record [Vol. 21, pp. 7-8, 15-17]) in light of the indictment, the search warrant affidavit, the Government and defense theories, and the evidence, will persuade this Court to reject the trial judge's stated position thereon. Here the Court reasoned that they contained nothing that ought to have been made available to the defense at an earlier time (Vol. 21, p. 2), and that the Martin documents should not, even then, be exposed to inspection by the defense (*ibid.*).

On the other hand, no one can deny, and surely not the Government in this case, that leads could possibly have been developed from the "suppressed material." And, surely the fact that this material exposes James Jones for certain (*Cf.*, App., pp. 104 and 146), possibly James Martin (See, App., p. 171) and Jason Brown as well, to have been a "source", as particularized in the affidavit for these search warrants, is a consideration too compelling to be ignored.

It was for this reason counsel specifically indicated to the Court his desire to "incorporate the contents of . . . [these documents] as a part of the renewed Motion to Suppress which was denied pretrial, denied at the close of the Government's case, when . . . renewed, and which . . . [was then] being renewed" (Vol. 21, p. 18).

The Government's privilege to refuse the disclosure of informants is, of course, not absolute, but rather entails "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U.S., at 62. Viewed in this sense, it may very well be that the petitioner had the burden of showing a need for the disclosure of the identity of the various "informers" and "sources" (*United States v. Marshall*, 526 F.2d 1349, 1359 [9th Cir. 1975]). Still, it would indeed be anomalous if that need were not satisfied by the Government's concession that some of them were participants. *Cf.*, *Lopez-Hernandez v. United States*, 394 F.2d 820 (9th Cir. 1968).

Given the fact of the prosecution's suppression of the various statements, access to which we have demonstrated our entitlement under *Brady*, even if the "standards governing the grant of a new trial vary according to the extent of the Government's culpability . . . [where, as here] the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely favorable to the defense." *United States v. Morrell*, 524 F.2d 550, 553 (2d Cir. 1975).

On the other hand, it just has to be the law that protection of the identity of confidential informers does not justify the making of either materially misleading or willfully deceptive representations to the Court. *United States v. Mele*, 462 F.2d 918, 924 (2d Cir. 1972).

IV. WHERE AN INDICTMENT CHARGES A SINGLE OVERALL CONSPIRACY, PROOF OF SEVERAL SEPARATE CONSPIRACIES IS NOT PROOF OF THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT.

Government evidence tended to show through the testimony of Julius Lyles, Betty Lyles, and Ruby Hammons that at one point they were engaged in a numbers operation with Donald Moore and John Allen. Ruby Hammons testified to facts which could support the idea that the defendant Eugene Scott was not a participant (Vol. 6, pp. 181, 183). Jerry Pierce's evidence tended to show him to be merely a "player" (Vol. 7, p. 146). It was also conclusively established that by January, or in January, 1974, Ruby Hammons, Betty Lyles and Julius Lyles were no longer employed in this operation (Vol. 7, pp. 89-90; Vol. 17, p. 101). Then there is the fact none of these witnesses could testify to any contact with the Hardings or Mary Stewart. Nor did any of those witnesses (*i.e.*, Ruby Hammons, Julius Lyles, Betty Lyles, and Jerry Pierce) testify to any conversation with, or conduct by, Virgil Ogletree that could in any way involve him in their crimes.

Then there is the fact here that Mary Stewart (testifying as a Government witness), and James Harding (testifying in his own defense) both denied any knowledge of or contact with Betty Lyles, Julius Lyles, Ruby Hammons and even Jerry Pierce. John Allen, the immunized witness (called by James Harding), testified that from the point James Harding entered the picture Donald Moore was out (Vol. 17, pp. 79, 84, 111-112). Allen further corroborated the idea that Jerry Pierce was a "player" (Vol. 17, p. 100), that Gene Scott and Jean Brown were not participants with Ruby Hammons and the Lyles (Vol. 17,

p. 81). And, he denied *any* knowledge concerning Virgil Ogletree (Vol. 17, p. 96) or Frank Moten (Vol. 17, p. 88). Also there is the conspicuous lack of any evidence as to what part, if any, James Jones, Elizabeth Hailes, Jason Brown and James Love Martin played in the overall conspiracy charged to justify the inclusion of their names in the charges as submitted to the jury.

Based on these facts alone there was a gap between January, 1974, when the Lyles, Ruby Hammons and Jerry Pierce disassociated themselves from the so-called "Ducky Moore Lottery."

The upshot of all this is there was simply no evidence in this record even tending to indicate that Julius Lyles, Betty Lyles, Ruby Hammons and Jerry Pierce participated in or furthered any conspiracy in which James Harding, Mary Stewart or Frank Moten were members. The same is true of the lack of evidence that any of the above named persons participated in any conspiracy in which James Love Martin, Jason Brown or James Jones were members. See *United States v. Cianchetti*, 315 F.2d 584, 587 (2d Cir. 1963).

In any event, the Court (despite the objections of the defense (Vol. 22, p. 67) and in the face of affirmative requests for instructions with a different thrust) charged the jury that these defendants could be convicted even if they found there was more than one conspiracy (Vol. 22, pp. 42-44). In a nutshell, the point being argued here is that in view of the fact more than one conspiracy was shown, the probability is that Moore's conviction (and possibly other defendants as well—including Ogletree) was the result of the transference of guilt to him (or them) from members of a conspiracy with which they had no

connection. See *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975).

As to the refusal to give the requested instruction, to the effect that the indictment charged one overall conspiracy and that proof of such conspiracy was required for a conviction, we contend the failure to do so deprived the defense of an instruction on their perception of the facts. See *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972), and *United States v. Gilbreath*, 452 F.2d 992, 994 (5th Cir. 1971).

In our judgment, the multiple conspiracy charge, as given to the jury, must be viewed as a variance from the charge as structured by the grand jury. Not only this, since the proof here arguably supports a finding of more than one conspiracy, the failure to submit this question to the jury (See *Green v. United States*, 332 F.2d 788 [5th Cir. 1964]) simply cannot be squared with the requirements of due process. Stated another way, we contend here that "proof of several conspiracies [the case here] is not proof of the single overall conspiracy charged in the indictment. . . ." *United States v. Tramunti*, 513 F.2d 1087, 1107 (2d Cir. 1975). If this is so then the trial court surely erred both in his rejection of the instructions tendered by the defense (Vol. 22, p. 67) and in the instructions that were in fact given (Vol. 22, pp. 42-44).

V. MEMBERSHIP IN A GAMBLING CONSPIRACY INVOLVING THE OPERATION OF A LOTTERY IN VIOLATION OF GEORGIA STATE LAW, AND CRIMINAL PARTICIPATION THEREIN, IS NOT ESTABLISHED AGAINST ONE WHO, WHEN ARRESTED AT HIS HOME IN OHIO, ADMITTED HE WAS A "PROFESSIONAL GAMBLER" AND THE FURTHER RELEVANT FACTS ONLY SHOWED THAT ON THE SEVERAL OCCASIONS WHEN HE WAS IN GEORGIA (DURING AN APPROXIMATE YEAR AND ONE-HALF PERIOD), HE SOCIALIZED WITH, AND WAS KNOWN TO BE IN THE COMPANY OF, SEVERAL PROVEN MEMBERS OF SUCH CONSPIRACY.

(A)

In this case based on the testimony of its expert, the Government took the rather nebulous position that the appearance on several exhibits of certain names, pseudonyms and symbols (*i.e.*, "B.H." [Vol. 14, p. 80], "Q Ball" [*id.*, pp. 53, 80], "Buster" [*id.*, p. 55] and "Ship" or "711" [*id.*, pp. 59, 128]), in the context of this case, showed the persons to whom these designations related to be "writers" or "ribbon men." And, as such, they were includable as persons to be counted as being involved in the charged illegal gambling business.

As to this, it is conceded that the Government's evidence did show that Julian Scott was known to his friends as "Q Ball" (Vol. 12, pp. 109-110), Luther Johnson as "Buckhead", Carl Goss as "Buster Mapp" and "Buster" (Vol. 12, p. 112) and Hodges as "Shipwreck" or "711". However, no one testified that *the* "QB" on the Government's exhibits referred to Julian Scott. Nor did anyone testify the "BH" referred to Johnson, or even that "Bust or

Buster" related to Carl Goss. The same was true of "711" designations.

On the other hand, there was testimony as to the appearance of five fingerprints made by Johnson on one slip in a pack of lottery business, dated September 11, 1974 (Vol. 15, p. 128), five of Goss' prints on three slips in packets of business for two days (Vol. 15, pp. 126, 133), and nine prints made by Hodges on eight slips from numbers business for four days (Vol. 15, pp. 114-116).

Despite this, the only possible connection in this evidence between Julian Scott and these numbers "operations" and the other alleged conspirators is the fact that Jerry Pierce said he knew Scott (Vol. 7, pp. 125, 128) and the designation "QB" and "Q Ball" on some of "the" lottery records. There was no evidence as to *any* personal association or even acquaintanceship by Scott with any of the other "conspirators".

As to Hodges, the facts do show that he was seen in the lobby of the Regency Hotel at the same time Virgil Ogletree, Donald Moore, Frank Moten and James Harding were seen in different parts of the same lobby (Vol. 6, pp. 87-92). Also, there was evidence that Hodges knew and had socialized with Donald Moore and James Harding (Vol. 19, p. 59). He had, on at least one occasion, been to Moore's home (Vol. 17, p. 67).

Thus, it seems all too clear that what the Court of Appeals found to be the case in *United States v. Murray*, 527 F.2d 401 (5th Cir. 1976), should be applied to both Hodges and Ogletree. Here, reference is being made to the Court's view that where "the only evidence produced to link [an accused] to the conspiracy was their occasional association with . . . [a conspirator]" such was not enough

"to establish a person's participation in the conspiracy" (*id.*, at 409).

An even further extension of this analysis is based on those facts, which defied our quest for amplification, that show the indictment charged without equivocation:

> That "*Defendants . . . Moten and . . . Ogletree . . . [were] partners . . . in the illegal gambling business and would act as the 'bankers'*, that is, the persons who owned the lottery business and finance, direct, manage, control and receive the major share of the profits derived therefrom" (App., p. 6). (Emphasis added.)

Here the point being made is that even the Government's own expert (and there was no other evidence on these points) voiced the opinion that based on the documents examined by him "the lottery involved only three of the so-called 'ribbon men' " (Vol. 14, p. 115). Of these *only* the name "Buster" even tended to suggest that appellation applied to any of the alleged conspirators. But even that is not all, it was their expert's opinion that the designations the Government would arrogate to Julian Scott, Luther Johnson, and Robert Hodges, only earned for them the "writer" label (See Vol. 14, pp. 37, 40, 43, 45, 53, 55, 62, 67, 86-88, 106).

The projected effect of this analysis is that once we excise from the indictment the names of James Jones, Jason Brown and James Martin, and Elizabeth Hailes, against whom there was either no "evidence" or grossly insufficient evidence presented connecting them to this case, or to any of those then being tried; *and* we eliminate Hodges, Julian Scott (and, of course, McGhee—who was found not guilty), considerable stress is imposed on the Government's proof as to the existence of the 30 day,

five member requirements of §1955. This stress becomes all the more acute when the evidence pointing toward Carl Goss, Luther Johnson and Virgil Ogletree as guilty participants is further analyzed.

(B)

As to Ogletree, one of these petitioners, any argument made by the Government must survive the facts (as argued above) that no witness testified to any criminal contact with him. At best, the evidence shows he knew Moore, Moten, Lyles and James Harding. There is a reasonable inference he knew Hodges and perhaps Lillian Harding.

The allegations in the indictment to the contrary notwithstanding, *there was no evidence Ogletree acted as a "banker" or that he was one of the persons, or the person "who owned the lottery business"* (App., p. 6). Nor was there *any* evidence he did any of the acts charged including the receipt of a "share of the profits" (*ibid.*).

Quite obviously, these gross evidentiary deficiencies must be further weighted by the fact that of the overt acts charged, Ogletree's name was only mentioned in three. Two involved Mary Stewart, who testified to facts which clearly showed Ogletree was not involved in her travel from New York to Atlanta. As to this, the jury's rendition of a not guilty verdict, in Ogletree's favor, based on the specific charge that his mere presence in the car that took her to the airport made him a participant in her travel plans is a fact that must be reckoned with.[13]

---

13. In our judgment, the doctrine of *Ashe v. Swenson*, 397 U.S. 1189 (1970) should impose a further obstacle to any argument that despite the verdict on Count 4, this fact shows him to be a conspirator and "banker" in the numbers game that had employed her.

The other reference, Overt Act No. 4, that he attended a party at Moore's home with certain specifically named conspirators was simply not proven, to say nothing of proving this social party (assuming there was even a party) was for the purpose of "recruiting of local . . . numbers lottery operators for a new lottery which was to be supervised by defendant Moore" (again, as specifically charged in the indictment). All this is said apart from the fact there was no evidence either that *anyone* ever discussed numbers with Ogletree or that numbers were even discussed at Moore's home, on the few occasions it was shown he visited the Moore home.

In any event, the Court specifically concluded that Ogletree *associated* almost exclusively with participants in the lottery (*United States v. Scott*, 555 F.2d, at 531). This conclusion has to be based solely on (1) testimony by Lyles (that he attended several social affairs at Moore's home in 1973, at which Ogletree was present), (2) other evidence showing Ogletree was (on one occasion) seen at the Regency Hotel and (on another occasion), was registered at the Stouffer's Inn, where several proven members of the conspiracy were either seen or were registered, and (3) testimony by Harding that he joined Moore and Louise Norton, Virgil Ogletree and Sandra Jackson, and Frank Moten at an Atlanta Supper Club where they enjoyed a night out on the town.

There was no other evidence of any association. Hence, to say Ogletree's associations in Atlanta were "almost exclusively with participants in the lottery" hardly seems a fair assessment of the facts in the record. But, even this is not all. The categorical statement that Ogletree made "numerous trips to Atlanta" is a clear distortion of the record. As argued elsewhere, the most that can be said by anyone, including the Government and the Court,

is that Ogletree was only in Atlanta four or five times between May, 1973 and September 24, 1974. How this can be tortured into "numerous trips", and then used as a premise for the ultimate conclusion drawn by the Court is really beyond our comprehension. Hopefully, if the Government fails to satisfactorily justify this expressed rationale it would then be up to this Court to conclude it is beyond theirs also.

The evidence did, of course, show Ogletree met Jackson on his first trip to Atlanta. And, he saw her on the few additional occasions when he came to the city. She also testified that, in order to be together, they arranged to meet, and did meet, in Las Vegas and in New York. Also, Lyles did testify the parties referred to by him were well-attended by fellow Delta Airline employees of Moore's companion (Louise Norton) and Ogletree's girlfriend (Sandra Jackson). At the risk of sounding repetitious, there is the irrepressible fact that Lyles only testified that he had seen several of the other defendants on at least one occasion at these various social affairs and that there was absolutely no conversation about gambling at any of them (Vol. 7, p. 66).

All this brings us to the ruling that the jury could properly infer Ogletree was a participant. Since the Government contended he was a *banker*, it must be that the Court approved this further inference, despite an even more drastic lack of evidentiary support.

(C)

The above argument applies both to the conspiracy charge and to the substance charge, only more so to the latter. Here, of course, it seems clear the conspiracy charge against Ogletree relies for its substance

on the innocuous fact of Ogletree's mere presence at several social affairs at Moore's home, where it perforce must be assumed *this* gambling business was discussed, and the fact of his public association with a few of the alleged conspirators.

As to the substantive charge, not even evidence of this nebulous and speculative ilk is present. So much so, that to conclude this record supports a finding that any of the things charged against him in Count II were in fact proved involves a resort to a pattern of abstract reasoning that is far too sophisticated to be of any practical use.

In essence, the real gut point being made in this segment of our Petition is that, as to Ogletree, there was insufficient evidence to support a finding of guilt beyond a reasonable doubt on either of his charges. Given the irridescent fact that there was no direct evidence of *any* participation by Ogletree in these charges, his conviction seemingly could only be credited if "the jury could conclude the evidence excluded all reasonable hypotheses of innocence." *United States v. Box*, 530 F.2d 1258, 1263 (5th Cir. 1976).

On the basis of the evidence presented here any such conclusion would be most unreasonable. This is so because the best that can be said for the case against Ogletree (and it really does not do this) is that a choice of reasonable probabilities can be said to exist. But even here, the rule seems to be that "[e]vidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal." *United States v. Saunders*, 325 F.2d 840, 843 (6th Cir. 1964).

(D)

As to Moore, while it must be conceded the evidence against him is stronger, still the argument that his conviction is also suspect is surely not specious. To be sure, his contentions as to the validity of this search warrant and the other points made herein aside, the evidence simply fails to support a finding that he was the member of a conspiracy that included as members the Hardings, Julian Scott, Elizabeth Hailes, Jason Brown, James Jones, James Martin and Robert McGhee. Indeed that evidence in no way supports a finding that the *charged* conspiracy was in fact proved.

The evidence as to Moore's guilt on the substantive offense should fare no better. For, while it could very well be said that the Record could support a verdict insofar as the lottery that included the Lyles, John Allen and Ruby Hammons as members, the inclusion of the additional names in the charges, as submitted to the jury, resulted in a contamination of this verdict as well. On this point it must surely be that, to the extent the verdict finding Moore guilty of the substantive offense was influenced by the artificial inclusion of those for whom there was insufficient evidentiary substantiation, his verdict must be viewed as defective.

VI. WHERE THE GOVERNMENT IS IMPERMISSIBLY GRANTED AN EXTRA PEREMPTORY CHALLENGE, WHICH IS USED TO EXCLUDE A SPECIFIC JUROR, THOSE ON TRIAL ARE DENIED ANY INPUT SUCH JUROR MAY HAVE ON THE JURY'S DELIBERATIVE PROCESS, SINCE THIS COULD POSSIBLY HAVE RESULTED IN THOSE ON TRIAL AT LEAST AVOIDING CONVICTION. THEY MUST BE REGARDED AS HAVING BEEN PREJUDICED THEREBY.

In this case, the Fifth Circuit held (despite specific objections by the defense to the Government's having an extra peremptory challenge) that in the absence of a showing that the rights of the defendants to a "fair and impartial jury ha[d] been endangered", a reversal was not required. But, that in any event "the claimed error . . . [did] not affect substantial rights and did not constitute reversible error" (*United States v. Scott,* 555 F.2d, at 533).

Here, we start with the fact that the language of Rule 24(b) is precise enough. There is simply no authority for granting to the Government any additional challenges. And, while we concede there is authority, as recognized in *United States v. Tucker,* 526 F.2d 279, 283 (5th Cir. 1976), "for the parties to stipulate for additional challenges", it could not be clearer—there was no such stipulation here. (*Cf., United States v. Potts,* 420 F.2d 964 [4th Cir. 1969]).

The essential question then is what is to be the effect of the improper grant to the Government of the extra challenge. In our view, the prejudice emanating therefrom affected all those on trial to some extent. This

being so, and there being no way to realistically gauge the extent of such prejudice, due process dictates that these convictions should have been reversed.

Then there is the viable concept that peremptory challenges give to a litigant the right *to reject*, as distinguished from the right to select, qualified jurors.[14] Obviously then, to the extent the Court improperly authorized the Government *to reject* a particular juror, those convicted in the wake thereof were undeniably victimized. If not for any other reason than the fact that it cannot be said (and certainly not with the required assurance, *Harrington v. California*, 395 U.S. 250 [1969]), that these petitioners would not have been able to avoid conviction had the improperly excluded juror been permitted to serve, the point here being urged should be considered made.

Stated another way, if these petitioners had been given the benefit of the input on the jury's deliberative process the excluded juror's presence would have afforded, there is a sufficient likelihood not only that this juror might have remained unconvinced of the guilt of these petitioners (or even one of them), but he may have persuaded others to his view.

Since the law did not provide for extra challenges by the Government, and there being no way specific prejudice can possibly be shown, the fact of a valid objection should alone have been regarded as a sufficient ground for a reversal. At the very least then, the Government should have had the "heavy burden" of proving that no possible prejudice could have eventuated from their unentitled use of the extra challenge. If it were

---

14. See *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 481 (1827).

otherwise, "there would be no sanction insuring adherence to the rule by trial courts". *New England Enterprises, Inc. v. United States*, 400 F.2d 58, 69 (10th Cir. 1968).

CONCLUSION

For all of these reasons, or at least for some of them, this Court should grant certiorari to review the convictions of both Ogletree and Moore.

Respectfully submitted,

JAMES R. WILLIS
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
Counsel for Petitioners Virgil Ogletree and Donald Moore

APPENDIX A

OPINION OF THE COURT OF APPEALS

(Dated July 11, 1977)

No. 76-1438

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EUGENE R. SCOTT, JEAN BROWN, ROBERT LEE HODGES, CARL GOSS, JULIAN LIONEL SCOTT, LUTHER JOHNSON, VIRGIL OGLETREE, DONALD MOORE, JAMES HARDING AND LILLIAN HARDING,
Defendants-Appellants.

July 11, 1977.

By judgments of the United States District Court for the Northern District of Georgia, at Atlanta, James C. Hill, J., defendants were convicted on one count of violating five-man gambling statute and all but one defendant was convicted on one count of conspiracy to do so and they appealed. The Court of Appeals, Edwin F. Hunter, Jr., District Judge, sitting by designation, held that: (1) affidavits relating to application for warrant to search premises for gambling paraphernalia were sufficient; (2) there was no abuse of discretion in failing to require the disclosure of identity of a confidential informant; (3) record did not indicate that an earlier disclosure of grand jury

testimony and statements of unindicted coconspirators who were not called as witnesses, would have been helpful; (4) evidence was sufficient to show a single conspiracy; (5) no abuse of discretion was shown in failing to grant or in denial of severance of trial for certain defendants; (6) evidence was sufficient to sustain convictions, and (7) no reversal was required because of granting government an additional peremptory challenge.

Affirmed.

1. Criminal Law (Key) 1158(2)

Magistrate's determination of probable cause is entitled to great deference by reviewing courts. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures (Key) 3.6(3)

Magistrate must be informed of some of the underlying circumstances relied on by person providing information as well as some of the underlying circumstances from which affiant concluded that informant was credible or that his information is reliable; if affidavit appears insufficient because either of the criteria has not been met probable cause may still be established if affidavit recites corroborative evidence which buttresses either informant's reliability or reliability of his information. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures (Key) 3.6(3)

Affidavit for search warrant, reciting results of extensive independent investigation by FBI and showing corroborating evidence in almost every instance of specific information provided by one individual, sufficient to justfy issuance of search warrant, contrary to contention that affidavit did not establish credibility of information attributed

to unnamed informants and sources and did not set forth sufficient information independent of data supplied by such informants and sources. U.S.C.A.Const. Amend. 4.

4. Gaming (Key) 60

Facts and circumstances described in affidavit for search warrant were sufficient to show probable cause to believe that evidence of illegal gambling activities would be found at those specified residences although nexus between items to be seized and places to be searched rested not on direct observation but normal inferences. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. §§ 371, 1955.

5. Searches and Seizures (Key) 3.6(2)

Issue of staleness of probable cause depends upon nature of unlawful activity alleged. U.S.C.A.Const. Amend. 4.

6. Lotteries (Key) 19

Where affidavit for search of premises for gambling paraphernalia did not simply allege isolated violation by owner of residence but rather revealed his current involvement in an established lottery, which had been in continuous operation and with which he had been intimately associated for over a year, it could not be successfully claimed that information relating to owner's activities for over a year was too stale to establish probable cause. U.S.C.A.Const. Amend. 4; 18 U.S.C.A. §§ 371, 1955.

7. Criminal Law (Key) 394.6(5)

Where party moving to suppress evidence seized pursuant to warrant based on claim that affidavit contained material misstatements, factual inaccuracies and other information, trial court properly denied a hearing on motion

in absence of no preliminary showing that some allegation in affidavit was false. U.S.C.A.Const. Amend. 4.

8. Witnesses (Key) 216

No fixed rule with respect to requiring disclosure of identity of confidential informants is justifiable and problem calls for balancing public interest and protecting flow of information against individual's right to prepare his defense; whether proper balance renders nondisclosure erroneous must depend on particular circumstance of each case, considering crime charged, possible defenses, possible significance of informer's testimony and other relevant factors.

9. Witnesses (Key) 216

Where evidence, in prosecutions for violation of five-man gambling statute and for conspiracy, did not show an isolated transaction, evidence as to events which revealed defendants' participation did not allude to any unidentified source and case did not rely upon secondhand accounts of lottery-related transactions between defendants and any of the sources, defendants had failed to demonstrate any need to know identities of these sources sufficient to outweigh Government's interest in preserving their anonymity. 18 U.S.C.A. §§ 371, 1955.

10. Criminal Law (Key) 627.8(2)

Record in prosecutions for violation of five-man gambling statute and conspiracy failed to show anything to indicate that an earlier disclosure of grand jury testimony and statements of unindicted coconspirators who were not called as witnesses, would have been helpful to any of the defendants who prior to and during course of trial

requested judge to order production of such material, contrary to claim of certain defendants that the production order came too late to permit adequate assessment of value of materials. 18 U.S.C.A. §§ 371, 1955.

11. Conspiracy (Key) 43(12)

Review of evidence in prosecutions for violations of five-man gambling statute and conspiracy showed that the dismissal of one group of employees and the recruitment of another group did not mark beginning of a new conspiracy but simply reflected internal personnel changes within a single, ongoing enterprise financed, supervised and served in various capacities by defendants, contrary to claim that a variance existed between indictment charging a single conspiracy involving multiple defendants and proof which allegedly revealed plural conspiracies involving multiple parties. 18 U.S.C.A. §§ 371, 1955.

12. Criminal Law (Key) 622(3)

To obtain a severance, movants have burden of convincing court that without such relief they will be unable to obtain a fair trial. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

13. Criminal Law (Key) 633(1)

Safeguards which must be accorded in a mass trial are clear rulings on admissibility, limitations of hearing of evidence as against particular individuals and adequate instructions.

14. Criminal Law (Key) 622(2)

Review of record of prosecution of a number of defendants for violations of five-man gambling statute and con-

spiracy showed that adequate safeguards were accorded the six complaining defendants, who had been denied their motions for severance of trial and that the risk of transference of guilt over border of admissibility was reduced to a minimum so that denial of severance motions was not an abuse of discretion. 18 U.S.C.A. §§ 371, 1955; Fed. Rules Crim.Proc. rules 8, 14, 18 U.S.C.A.

15. Criminal Law (Key) 622(2)

There was no showing of an abuse of discretion by trial court in denying motion of certain defendants for severance of their trial for conspiracy and violations of five-man gambling statute following testimony of one of the codefendants relating to an alleged bribe by government agent to such defendant to implicate other defendants who he refused to implicate because they were not involved, since likely impact of such testimony, if believed, was to cast doubt on good faith of Government's prosecution rather than to prejudice defendants who codefendant witness was supposed to implicate. 18 U.S.C.A. §§ 371, 1955; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

16. Criminal Law (Key) 622(2)

Merely because certain defendants might have had a better chance of acquittal if tried separately does not establish their right to a severance. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

17. Criminal Law (Key) 1144.13(3)

Reviewing court must view evidence and reasonable inferences to be drawn therefrom in light most favorable to Government.

18. Criminal Law (Key) 560

Test for sufficiency of evidence to sustain conviction is whether reasonable jurors could find evidence inconsistent with every hypothesis of innocence.

19. Conspiracy (Key) 47(7)

Review of evidence in prosecution of numerous defendants for conspiracy to violate the five-man gambling statute revealed in every practical sense a single conspiracy and that each of the defendants was an integral part of that conspiracy. 18 U.S.C.A. §§ 371, 1955.

20. Criminal Law (Key) 427(5)

Where, defendant charged with conspiracy to violate five-man gambling statute, at time of his arrest admitted that he was a professional gambler, his statement established necessary predicate of prima facie showing of such defendant's participation in conspiracy and was sufficient to permit jury to consider hearsay declarations of other coconspirator trying defendant, admitting to be a professional gambler, to the lottery operation. 18 U.S.C.A. §§ 371, 1955.

21. Criminal Law (Key) 423(1)

Hearsay rule does not automatically bar all out of court statements by defendant in criminal case, and declarations by one defendant may be admissible against others on a sufficient showing by independent evidence of conspiracy among one or more other defendants and the declarant, if the declarations at issue were in furtherance of that conspiracy.

22. Criminal Law (Key) 1166.18

Reversal of convictions is mandated only if a defendant's right to exercise peremptory challenges is abridged or if his right to a fair and impartial jury has been endangered. Fed.Rules Crim.Proc. rule 24, 18 U.S.C.A.

23. Criminal Law (Key) 1166.16

Where the granting of an additional peremptory challenge to Government and two additional challenges to defendants, being prosecuted for violation of five-man gambling statute and conspiracy, in no way abridged defendants' rights to exercise their challenges and the allocation of strikes preserved for proportional advantage held by defense, in absence of any evidence that jury finally selected was other than representative and impartial, claimed error of allowing additional peremptory challenge to Government did not constitute reversible error. 18 U.S.C.A. §§ 371, 1955; Fed.Rules Crim.Proc. rule 24, 18 U.S.C.A.

Appeals from the United States District Court for the Northern District of Georgia.

Before MORGAN and FAY, *Circuit Judges*, and HUNTER,* *District Judge*.

EDWIN F. HUNTER, *District Judge*:

Appellants were convicted and sentenced on one count of violating the five-man gambling statute, 18 U.S.C. § 1955, and all but appellant Lillian Harding were con-

*Senior District Judge of the Western District of Louisiana, sitting by designation.

victed on one count of conspiracy to do so in violation of 18 U.S.C. § 371.[1]

The core of the Government's conspiracy theory involved a numbers lottery. In simplest terms this lottery consisted of persons picking a number and wagering that theirs would be the winning number. The daily winner was determined by a pre-arranged process and generally paid odds of five or six hundred to one. In the instant case the "hit," or winning number, was derived by taking the hundred-thousand and ten-thousand digits from the total bond sales on the New York Stock Exchange for that day as the first two figures and the ten-thousand digit from the total shares traded on the Big Board that day as the third. For example, if the total volume of bond sales on the New York Stock Exchange was $19,570,000 and the total shares traded was 16,250,000, the winning number for that day would be 575.

At street level, bets were placed with "writers" or "books" who would then pass the information either to "ribbon men" or directly to telephone relay operators. Four defendants, Julian "Q-Ball" Scott, Robert "Shipwreck" Hodges, Carl "Buster Mapp" Goss, and Luther "Buckhead" Johnson, were all named in the indictment as being writers or "ribbon men."[2] These defendants would

1. The district judge granted a motion on behalf of Frank Moten for severance due to his health. Robert Lee McGhee was acquitted. The remaining ten defendants were found guilty of the substantive gambling charge, and all except Lillian Harding were convicted of conspiracy. The penalties imposed ranged from Lillian Harding's three-year sentence on the substantive Section 1955 violation, which was suspended in favor of three years' probation, to Virgil Ogletree's concurrent five year prison terms and cumulative $10,000 fines on each of Counts I and II.

2. Nicknames are often used in recording gambling information. For example, a significant portion of the evidence against Julian "Q Ball" Scott dealt with the fact that "Q Ball or "Q B" was found on lottery records to indicate a writer or ribbon man.

in turn pass the betting information to one of the telephone relay operators. The operators would record this information and compute the amount bet on each number. The operator's tally sheets and cassette tape recordings of phone calls received by them were then taken to the lottery "headquarters" by a "drag man." Eugene Scott worked in this capacity. Scott's duties consisted of making daily rounds to writers, ribbon men, and telephone relay operators, from whom he would pick up the lottery records for that day's wagering activities and deliver them to the lottery office prior to the closing bell of the New York Stock Exchange. Sometimes, he would also serve as a "collector" and would collect the money wagered less "hits" and the percentages due writers and ribbon men. The office was run by James Harding, a retired New York City police lieutenant, who was assisted by his wife, Lillian. It was there that records were kept of the "hits" and "totals" and also there that the amounts disbursed were controlled.

The upper echelon of the operation consisted of two "bankers" and their assistant or "troubleshooter" in Atlanta. The alleged bankers in this operation were Virgil Ogletree of Cleveland, Ohio, and Frank Moten of the New York City area. Donald "Ducky" Moore supervised the daily operations in Atlanta.

On appeal, defendants assert errors in the disposition of pre-trial motions, in the conduct of the trial, and in the substance of their convictions. Upon consideration of the numerous and overlapping assignment of errors, we find no reversible error and affirm.

THE SUFFICIENCY OF THE AFFIDAVIT

On the afternoon of September 24, 1975, federal agents armed with warrants searched the residences of Donald Moore and James Harding. In the course of their search they discovered and seized a number of incriminating items, later introduced in evidence. The warrants authorizing these searches were issued on September 23, 1975 by U. S. District Judge Newell Edenfield[3] on the basis of a 49-page affidavit prepared by Special Agent Donald P. Burgess of the Federal Bureau of Investigation. Burgess' affidavit set forth information received from unnamed "informants" and "sources." It also contained Bureau investigation and telephone company records. Additional support for the issuance of the warrants was provided in the form of Agent Burgess' recitation of past experience:

> Affiant [Burgess] has learned from his prior experience in investigating illegal numbers lotteries that the persons engaged therein customarily keep wagering paraphernalia, such as lottery slips, rundown sheets, ribbons, tapes, collection sheets, books of accounts, miscellaneous records of bets, code books, lists of telephone numbers, checks, money orders, and records of bank accounts in conducting such lotteries * * *. They also maintain safety deposit boxes with local banking concerns for the purpose of hiding lottery records, account ledgers and money. Normally, pass keys to such safety deposit boxes are kept by lottery participants on their person as well as in their headquarters, residences and vehicles. Based on all the information, facts, and circumstances set forth heretofore, Affiant has probable cause to believe that the foregoing described wagering paraphernalia and

3. While Judge Edenfield approved issuance of the warrants, he did not preside at the trial.

money is now being concealed on the premises, persons and in the automobiles previously described, and more particularly described in each of Affiant's individual Affidavits for Search Warrants, which are attached hereto.

[1, 2] Motions for the return of the seized evidence and for suppression were denied both prior to and during the trial. The thrust of these motions was that the affidavit was insufficient to support the issuance of the search warrant because (1) it did not establish the credibility of the information attributed to the unnamed "informants" and "sources", and (2) it did not set forth sufficient information independent of the data supplied by these "informants" and "sources" from which Judge Edenfield could reasonably have concluded that wagering paraphernalia was located at the Harding or Moore residences. Thus framed, appellants argue that the search warrants were invalid, in that the probable cause requirement of the Fourth Amendment was not met.[4] The mainstay of the Fourth Amendment's protection against unreasonable searches and seizures is the warrant requirement. What showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of informants, known to the police but not identified to the magistrate? *United States v. Harris,* 403 U.S. 573, 575, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). We are mindful of the admonition that a magistrate's determination of probable cause is entitled to great deference by reviewing courts. *Jones v. United States,* 362 U.S. 257, 270-71, 80

4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Amendment IV, United States Constitution.

S.Ct. 725, 4 L.Ed.2d 697. The legal sufficiency is to be judged under the double test announced by the Supreme Court in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and subsequently in *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1964). The magistrate must be informed of some of the underlying circumstances relied on by the person providing the information, as well as of some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable. If the affidavit appears insufficient because either of these criteria has not been met, probable cause may still be established if the affidavit also recites corroborative evidence which buttresses either the informant's reliability or the reliability of his information. *Spinelli, supra.*

[3] The affidavit here amply satisfied both criteria. The results of extensive independent investigation by the FBI established a "substantial basis" for crediting the information received. Moreover, in almost every instance specific information provided by one individual was corroborated by the fact that others contributed almost identical information. *United States v. Harris,* 403 U.S. 573, 580-581, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). This combination of informants' tips and FBI observations over an extended period of time is amply sufficient to warrant a man of reasonable caution to believe that an offense had been committed. *United States v. Tucker,* 526 F.2d 279, 281 (1976).

[4] Appellants also attack the sufficiency of the affidavit by contending it did not reveal probable cause to believe that evidence of illegal gambling activity would be found in the Moore and Harding residences. The situation here does not differ markedly from other cases wherein this court and others, albeit without discussion,

have upheld searches, although the nexus between the items to be seized and the place to be searched rested not on direct observation but on the normal inferences as to where the articles sought would be located. *United States v. Lucarz*, 430 F.2d 1051 (9th Cir., 1970). This court has recently addressed the problem:

> While there is no firsthand evidence in the affidavit that materials subject to seizure were in the premises where the officers proposed to conduct their search, this is not always necessary. For instance, evidence that a defendant has stolen material which one normally would expect him to hide at his residence will support a search of his residence * * *.
>
> The affidavit need not contain information providing certainty that the objects sought will be found as a result of the search. It is only necessary that "the facts and circumstances described in the affidavit would warrant a man of reasonable caution to believe that the articles sought were located" at the place where it was proposed to search. [citation omitted.] It is axiomatic that an affidavit for search warrant is to be interpreted in a common sense and realistic manner, and the magistrate's finding of probable cause should be sustained in doubtful or marginal cases. *United States v. Maestas*, 546 F.2d 1177, 1180 (5th Cir., 1977).

With the thoughts of the *Maestas* court in mind, the issue quickly narrows: Under the facts and circumstances described in the affidavit, would a man of reasonable caution believe that the articles sought were located at the place it was proposed to search? All of the sources and informants named Moore as the person in charge of the Atlanta numbers game during 1973 and 1974. The affi-

davit further recited that in the experience of affiant, persons engaged in illegal numbers lotteries usually kept lottery items in their headquarter residences and vehicles and specifically set forth information indicating that Moore was in fact transacting lottery-related business at home. Similarly, the affidavit established probable cause to believe that wagering paraphernalia could be found at the residence of James and Lillian Harding.

As appellants point out, the affidavit does not contain anyone's observation of the property at the respective residence; that missing information, however, is not fatal to a determination that probable cause existed to search the residence. Admittedly, there are other places where gambling paraphernalia might have been stored. Yet, we believe the facts and circumstances of this case gave the magistrate probable cause to believe the paraphernalia seized would be found.

[5, 6] We also reject Moore's argument that the information contained in the affidavit was too stale to establish probable cause, because much of it dealt with his activities during 1973. The issue of staleness of probable cause depends upon the nature of the unlawful activity alleged. *Bastida v. Henderson*, 487 F.2d 860, 864 (5th Cir., 1973); *United States v. Harris*, 482 F.2d 1115, 1119 (3rd Cir., 1973); *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir., 1972). The affidavit here did not simply allege an isolated violation by Moore but rather revealed his current involvement in an established lottery which had been in continuous operation, and with which he had been intimately associated, since at least the early summer of 1973. Thus, the inclusion of information about Moore's activities during 1973 and early 1974 was necessary to give meaning to the data concerning his activities in the weeks and months immediately preceding submission of the affidavit.

[7] Appellant Moore alleged, in support of a pretrial motion to suppress, that "the affidavit, upon which this warrant was based, contains material misstatements, factual inaccuracies, and other misinformation made therein for the purpose of over-persuading the Court to issue this search warrant." No effort was made to specify which portions of the affidavit were inaccurate. No allegation was made that defense counsel possessed any information which might substantiate any charge that affiant Burgess had wilfully or intentionally misled the judge. During a hearing to discuss pending pretrial motions, Moore offered nothing in support of his allegation, although the court specifically requested comments from counsel on the issue of whether a hearing was necessary to dispose of the motion to suppress. In his written order denying the motion to suppress, the court noted that Moore was not entitled to an evidentiary hearing as to the truth of the matters in the affidavit because Moore had "set forth nothing that would indicate the information in the affidavit is false."

The trial court's ruling was proper. Every Circuit that has considered the issue has agreed that a movant must, at the very least, make a preliminary showing that some allegation in the affidavit is false before he is entitled to a hearing for the purpose of impeaching the affidavit. *United States v. Belculfine,* 508 F.2d 58, 63 (1st Cir. 1974); *United States v. Dunnings,* 425 F.2d 836, 839, 840 (2nd Cir. 1969), *cert. den.* 397 U.S. 1002, 90 S.Ct. 1149, 25 L.Ed.2d 412; *United States v. Luna,* 525 F.2d 4, 8 (6th Cir., 1974); *cert. den.* 424 U.S. 965, 96 S.Ct. 1459, 47 L.Ed.2d 732, 1976; *United States v. Carmichael,* 489 F.2d 983, 988 (7th Cir., 1973); *United States v. Rael,* 467 F.2d 333, 336 (10th Cir., 1972), *cert. den.* 410 U.S. 956, 93 S.Ct. 1429. See also *United States v. Armocida,* 515 F.2d 29, 40-42 (3rd

Cir., 1975); *cert. den.* 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84; *United States v. Marihart,* 492 F.2d 897, 899 (8th Cir., 1974), *cert. den.* 419 U.S. 827, 95 S.Ct. 46, 42 L.Ed.2d 51.

DISCLOSURE OF IDENTITY OF CONFIDENTIAL INFORMANTS

Appellants utilize two arguments in support of their contention that the informers' identities were necessary to the preparation of their defense. First, it is argued that under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) the evidence was potentially exculpatory. *Brady* does not permit a defense fishing expedition whenever it is conceivable that evidence beneficial to defendants may be discovered. Rather, it deals with prosecutorial misconduct in the form of withholding information which itself is material to exculpating the defendant or impeaching government witness. *United States v. Davis,* 487 F.2d 1249 (5th Cir., 1973). There has been no such showing here.

[8] *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), governs requests for identification of confidential informers. There, the Court stated:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 60, 61-62, 77 S.Ct. at 629.

[9] Unlike the situation in *Roviaro* "where the Government's informer was the sole participant, other than the accused," the case against these appellants did not turn upon proof of an isolated transaction. The evidence presented to the jury concerning the series of events which revealed appellants' participation did not in any way allude to the existence of any unidentified source. The government's case did not rely in any measure upon secondhand accounts of lottery-related transactions between appellants and any of the sources. Having thus failed to demonstrate any need to know the identities of these sources sufficient to outweigh the government's interest in preserving their anonymity, appellants were not entitled to disclosure. *United States v. Freund,* 525 F.2d 873 (5th Cir., 1976); *United States v. Doe,* 525 F.2d 878 (5th Cir., 1976).

THE PRIOR STATEMENTS OF UNINDICTED CO-CONSPIRATORS

[10] Both prior to and during the course of the trial, appellants requested the judge to order the government to produce the grand jury testimony and any statements of unindicted co-conspirators. These individuals were not called as witnesses. However, near the conclusion of the trial, the government tendered the requested grand jury transcripts and FBI interview summaries to the court for *in camera* inspection. After its examination of these materials the court remarked "in sum and total there is nothing here helpful to the defense." Nevertheless, in an effort to insure that appellants had the benefit of any materials which could conceivably aid them in their defense, the district judge instructed government counsel to give to defense counsel the material relating to Jones, Brown and Hailes.

Appellants Moore, Ogletree and the Hardings contended that the trial court's production order came too late to permit them to assess adequately the value of these materials. We find nothing in the record to indicate that an earlier disclosure would have been helpful.[5]

SINGLE OR MULTIPLE CONSPIRACIES

[11] All appellants assert that a variance existed between the indictment charging a single conspiracy involving multiple defendants and the proof which, at best, they claim revealed plural conspiracies involving multiple parties. As a result, appellants argue, the probability that their individual conviction was the result of the transference of guilt to him (or her) from members of a conspiracy with which they had no connection. *U. S. v. Bertolotti,* 529 F.2d 149 (2nd Cir., 1975). Appellants rely primarily on the fact that some of the people who worked in the lottery in 1973 were no longer active during the final months of its operation. Specifically, they argue that Mary Stewart and James Harding, who managed the lottery office during the summer of 1974, were not employed by the lottery at its inception in 1973 and were thus not acquainted with Betty Lyles, Julius Lyles, Ruby Hammons and Jerry Pierce. Julius Lyles' testimony that he continued to turn over his "book" to the "Ducky" Moore operation, even after he and his wife had been fired by Moore, is probative of the fact that the lottery remained in continuous operation between the departure of

---

5. These appellants apparently contend that the materials are exculpatory on the theory that they showed that the three unindicted co-conspirators were merely "players," or bettors, and therefore could not be counted for purposes of determining whether the Atlanta lottery involved the statutorily-required number of participants. The government did not introduce any evidence at trial to show that these individuals were members of the organization, and thus the jury could not have counted them in reaching its verdict.

the Hammons, Pierce and the Lyles, and the arrival of the Hardings. The dismissal of one group of employees and the recruitment of another group did not mark the beginning of a new conspiracy, but simply reflected internal personnel changes within a single, on-going enterprise financed by Ogletree, supervised by Moore, and served in various capacities by Eugene Scott, John Allen, Robert Hodges and Jean Brown.

The record reflects careful planning and cooperation on the part of the persons involved. It would be a perversion of natural thought to call such continuous cooperation a cinematographic series of distinct conspiracies rather than to call it a single one. *United States v. Perez,* 489 F.2d 51, 63 (5th Cir., 1973). In any event, under the circumstances presented, with overlapping membership and activities all directed toward a common goal, most courts have found, as we do here, sufficient evidence to uphold the jury verdict reflecting a single conspiracy. *United States v. Perez,* supra; *United States v. Cruz,*[6] 478 F.2d 408 (5th Cir., 1973); *United States v. Lloyd,* 425 F.2d 711 (5th Cir., 1970); *United States v. Nasse,* 432 F.2d 1293 (7th Cir., 1970); *United States v. Borelli,* 336 F.2d 376 (2nd Cir., 1964); *United States v. Morado,* 454 F.2d 167 (5th Cir., 1972).

SEVERANCES

[12-14] In contentions closely related to those alleging prejudicial variance between the indictment and

6. Appellants also contend that the trial court erroneously instructed the jury on the issue of multiple conspiracies. Although in our view the evidence revealed a single conspiracy, the trial court, out of an abundance of caution, submitted the issue to the jury, as it was entitled to do. *United States v. Vicars,* 467 F.2d 452, 454 (5th Cir., 1972). This charge correctly stated the law as enunciated in *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 557 (1946).

the proof, appellants Brown, Hodges, Goss, Johnson, Eugene Scott and Julius Scott argue that their initial joinder in the same indictment and subsequent joinder for trial were improper. They contend that even if one conspiracy was shown as we have held, and joinder was therefore proper under F.R.Crim.P. 8, the complexity of the evidence rendered denial of their motions for severance under F.R.Crim.P. 14 an abuse of discretion. To obtain a severance under Rule 14 the movants have the burden of convincing the court that without such relief they will be unable to obtain a fair trial. *United States v. Perez,* supra. In *Blumenthal,* 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947), the Supreme Court, in responding to contentions on appeal that the safeguards implemented by the trial court were inadequate to preclude compelling prejudice, listed three safeguards which must be accorded in a mass trial: (1) clear rulings on admissibility; (2) limitations of the hearing of evidence as against particular individuals and (3) adequate instructions. Each safeguard was accorded, and in view of the trial court's caution, the risk of transference of guilt over the border of admissibility was reduced to the minimum.

[15] It is further asserted by some appellants that the trial court abused its discretion by denying their motion for severance which was made following the testimony of co-defendant James Harding. The focus of this argument was Harding's claim that a few days following his arrest a government agent offered him $1,000 to implicate Ogletree and Moten in the Atlanta numbers lottery. Precisely, Harding stated that FBI Agent Paul King took him to a safety deposit box where Harding kept some gambling proceeds and proposed to Harding that "if I would be cooperative with him that I could have some of the money." Harding stated that he was then allowed to

take $1,000 from the safety deposit box. Harding did not mention any of the other appellants in his testimony. He did state, of course, that he was asked to cooperate to "get Ogletree and Moten" and that he refused because Ogletree and Moten were not involved. As the trial court noted in denying the motion for severance, the likely impact of Harding's testimony, if believed, was to cast doubt on the good faith of the government's prosecution rather than to prejudice these appellants.

[16] We further reject the contention that the conduct of the other defense counsel was not conducive to a fair trial. That certain defendants might have had a better chance of acquittal if tried separately does not establish their right to a severance under Rule 14. *United States v. Clark*, 480 F.2d 1249 (5th Cir., 1973).

SUFFICIENCY OF THE EVIDENCE

Appellants Moore, Ogletree, Julius Scott and Lillian Harding insist that the evidence against each of them was insufficient to prove their participation in the lottery operation.

[17-19] We must view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Leslie*, 542 F.2d 285 (5th Cir., 1976); *United States v. Rojas*, 537 F.2d 216 (1976). The test for sufficiency is whether reasonable jurors could find the evidence inconsistent with every hypothesis of innocence. *United States v. Rojas*, supra. Under these standards we hold that in every practical sense the facts reveal a single conspiracy and that each of the appellants was an integral part of that conspiracy. The guilt of each has been proved beyond a reasonable doubt.

(1) *Donald Moore*—The evidence against Moore was overwhelming. He recruited Julius Lyles to join the lottery in 1973 and supervised Lyles' collection activities. He directly supervised the operation of the lottery office during Hammons' tenure. FBI surveillance established his continued association during 1974 with other individuals whose involvement at that time is undisputed. A large volume of lottery paraphernalia bearing the fingerprints of those in charge of the lottery office during 1974 was seized from Moore's residence by FBI agents.

[20, 21] (2) *Ogletree*—His role is substantially shown by his numerous trips to Atlanta during which he associated almost exclusively with participants in the lottery. He was with Frank Moten on July 21, 1974 when Moten drove Mary Stewart to LaGuardia Airport so that she could travel to Atlanta to join the lottery. At the time of his arrest Ogletree made the statement that he was a "professional gambler." This evidence established the necessary predicate of a prima facie showing of Ogletree's participation in the conspiracy. *United States v. James*, 510 F.2d 546 at 549 (5th Cir., 1975). This was sufficient to permit the jury to consider the hearsay declaration of co-conspirator Donald Moore to Jerry Pierce that his partner in the lottery was "Virgil," and a similar declaration by co-conspirator Eugene Scott to Mary Stewart to the effect that Scott was going to ask "Virgil" for a raise in pay.[7] These declarations clearly tied Ogletree to the lot-

---

7. Appellant Ogletree devotes several pages of his brief to a claim that the admission of this testimony concerning the declarations of co-conspirators violated his right of confrontation. The hearsay rule does not automatically bar all out-of-court statements by a defendant in a criminal case. Declarations by one defendant may be admissible against other defendants upon a sufficient showing by independent evidence, which existed here, of a conspiracy among one or more other defendants and the

(Continued on following page)

tery operation and made it clear that his periodic trips to Atlanta to meet with the lottery's operators were for the purpose of supervising and checking on the operation. Surely, the jury was entitled to draw reasonable inferences from coincidental appearances and statements as regular as his.

(3) *Lillian Harding*—She argues that she was an innocent bystander to her husband's involvement in the lottery. Mary Stewart testified that Lillian Harding drove her to pick up the daily lottery slips from Eugene Scott during certain periods of the conspiracy. FBI surveillance agents observed Mrs. Harding on several occasions carrying out lottery-related duties.

(4) *Julian Scott*—The evidence of Scott's involvement is clear and unambiguous. Scott was known in the Atlanta community by the distinctive name of "Q Ball." Many of the gambling records seized from the various apartments on September 24, 1974 bore the designation "Q Ball" or "Q B." An FBI lottery expert concluded, based upon his examination of those records, that "Q B" served as at least a bet writer for the Atlanta organization. This and other coincidental appearances was sufficient so that the jury could find his participation inconsistent with every other hypothesis of innocence beyond a reasonable doubt.

Footnote continued—

declarant, and if the declarations at issue were in furtherance of that conspiracy. *United States v. Nixon*, 418 U.S. 683 at 701, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Ogletree particularly objects to a portion of Julius Lyles' testimony regarding Moore's statement that he would have to check with "Virge." That portion of Lyles' testimony passed without objection. In any event, the remark clearly evidenced Lyles' status as an employee of the lottery operation and was accordingly relevant to the existence of the conspiracy.

THE GOVERNMENT'S PEREMPTORY CHALLENGES

The subject of peremptory challenges was first discussed on November 3rd during a conference of court and counsel. At that time the court tentatively ruled that the defendants would collectively be accorded ten peremptory challenges, and the government six.[8] Subsequently, on November 4, 1975, Mr. Silver, one of the defense counsel, moved for peremptory challenges in excess of the number provided in Rule 24 of the Federal Rules of Criminal Procedure. Specifically, he requested that the defense be given two additional challenges. The motion was taken under advisement and after completing the examination of prospective jurors, the following is recorded in the trial transcript:

(Conference at bench):

The Court: I am now going to take about a ten minute recess so you can consult your notes and be ready then to move.

Now, I think I can give seven [peremptory, challenges] to the government, twelve to the defense; and I hope by taking this little recess that you can move reasonably swiftly in selecting your strikes.

---

8. Rule 24. Trial Jurors

* * * * *

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Mr. Slotnick: [Counsel for James and Lillian Harding] We would object to the government having an additional peremptory. I don't think they need it, there are so many of us and just one of them.

The Court: We have it on the record, but I will give them seven and you twelve.

Mr. Slotnick: Thank you.

(Court recessed for ten minutes.)

After Recess

The Court: Let me see counsel for the government just a moment, and, of course counsel for the defendants are invited. I just want to pass along something Mr. Silver called to my attention.

(Conference at bench.)[9]

The Court: All right, Mr. Evans, you may call to the attention of counsel the procedure for the selection of the jury, and there will be the number of strikes that I announced in the side bar conference we had just before the break.

Mr. Slotnick: Over our objection, Your Honor.

The Court: I understand.

Our research reveals five cases concerning the discretion of a federal district court to allow the government expanded peremptory challenges. *Kloss v. United States*, 77 F.2d 462 (8th Cir., 1935), involved a misdemeanor. Statutorily, the government was entitled to three chal-

9. This conference was not recorded, but Mr. Silver in his supplemental brief, notes that during the recess he obtained a copy of the United States Code Service and read to the judge the pertinent code section and cited at least one case wherein it was held that the government could not have the extra challenge.

lenges. The district court permitted five. The Eighth Circuit concluded that defendant did not properly raise the objection and that a party's right to reject or object to the selection of jurors ends when a fair and impartial panel has been chosen. In *New England Enterprises, Inc. v. United States,* 400 F.2d 58 (1st Cir., 1968), *cert. den.* 393 U.S. 1036, 89 S.Ct. 654, 21 L.Ed.2d 581 the First Circuit declined to consider whether it was error under Rule 24(b) to employ a jury selection procedure which permitted both defense and prosecution to exercise unlimited peremptory exceptions. It was noted that defense counsel's general objections to the procedure did not specifically apprise the trial court as to the precise issue. In *United States v. Projansky,* 465 F.2d 123 (2nd Cir., 1972), *cert. den.* 409 U.S. 1006, 93 S.Ct. 432, 34 L.Ed.2d 299 the trial court granted defendants 16 challenges and the government eight. Defense counsel categorically entered a formal objection to the allowance of the two extra challenges. The Court of Appeals declared that the trial judge was not made aware of Rule 24(b) and that because of this, and

> "in the absence of a showing of prejudice, the claimed error does not affect 'substantial rights.'"

In *United States v. Potts,* 420 F.2d 964 (4th Cir., 1970), *cert. den.* 398 U.S. 941, 90 S.Ct. 1855, 26 L.Ed.2d 276, appellants urged that the trial judge erroneously allowed two additional challenges to each side. Eight were permitted to the prosecution, and 12 to the government. The court stated:

> "No doubt of the impartiality of the jurors who tried the case is even intimated. Moreover, the procedure was agreed upon by counsel as an acceptable method of choosing a jury. We perceive no possible injury to the appellant or other error in this procedure."

In *United States v. Tucker*, 526 F.2d 279 (5th Cir., 1976), the trial judge initially granted additional peremptories to both prosecution and defense, but withdrew all additional challenges when defense counsel argued that there was no authority to grant additional peremptories to the government. This court noted:

> "Their argument is based on the inferences from the last sentence of Fed.R.Crim.P. 24(b), which provides: 'If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.'"
>
> "Assuming arguendo that defense counsel were correct in this argument, it is nonetheless permissible for the parties to stipulate for additional peremptories by both sides."

[22, 23] In considering the question of an excess peremptory challenge granted to the government, we find no decision that holds this to be plain error. The lack of precedent is of little weight, because plain error must be determined on a case by case basis. In our view reversal is mandated only if a defendant's right to exercise peremptory challenges is abridged, or if his right to a fair and impartial jury has been endangered. In this case, the additional peremptory challenges did not in any way abridge these appellants' right to exercise their own challenges. Moreover, the allocation of strikes—12 for the defense and 7 for the prosecution—preserved the proportional advantage held by the defense and actually increased from four to five the numerical superiority in peremptories normally enjoyed by the defense under the rule. There is no evidence that the jury as finally selected was other than representative and impartial. The claimed

error does not affect substantial rights and did not constitute reversible error.[10]

CONCLUSION

All other claims of error have been considered and are rejected. We affirm the judgment of the trial court as respects all appellants on each count under which convicted.

---

10. We note that this problem is unlikely to be a recurring one. The proposed new rule governing the allocation of peremptory challenges vests the trial court with discretion to grant additional peremptory challenges to either the defense or the prosecution. See proposed Rule 24(b)(2)(A) in Communication from the Chief Justice of the United States, H.R. Doc. No. 464, 94th Cong., 2d Sess. 13. The new version of Rule 24(b) is currently scheduled to become law on August 1, 1977. Act of July 8, 1976, Pub.L.No. 94-349, § 1, 90 Stat. 822.

APPENDIX B

ORDER OF COURT OF APPEALS ON PETITIONS FOR REHEARING

(August 19, 1977)

No. 76-1438

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EUGENE R. SCOTT, JEAN BROWN, ROBERT LEE HODGES, CARL GOSS, JULIAN LIONER SCOTT, LUTHER JOHNSON, VIRGIL OGLETREE, DONALD MOORE, JAMES HARDING and LILLIAN HARDING,
Defendants-Appellants.

Appeal From the United States District Court for the Northern District of Georgia

---

ON PETITIONS FOR REHEARING

(August 19, 1977)

Before MORGAN and FAY, *Circuit Judges,* and HUNTER*, *District Judge.*

---

*Senior District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing on behalf of all appellants except James Harding & Lillian Harding filed in the above entitled and numbered cause be and the same are hereby DENIED.

Entered for the Court:

/s/ EDWIN F. HUNTER JR.
United States District Judge